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846	foot note (1)	2 Ch. D. 318.	2 Ch. D. 348.
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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re SIDDALL (A PERSON OF UNSOUND MIND).

C. A. 1885 Jan. 19.

Company—Freehold Land Society—Association of more than Twenty Persons—Business for the Acquisition of Gain—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 4 [*Revised Ed. Statutes, vol. xiv., p.* 203].

In 1873 an association of more than twenty persons was formed for the object, as stated in its deed of settlement, of purchasing a freehold estate and reselling it in allotments to the members of the association. The deed was executed by all the members, the name of each, the number of his allotment, the total amount he was to pay, and the amount of his monthly payment to be made in respect of it, being specified in a schedule to the deed. The property was vested in trustees, and its management was vested in a president, vice-president, treasurer, secretary, and a committee. The deed contained provisions for the conveyance to the members of their allotments when they had paid up the whole amount payable in respect of them, and for forfeiture and sale of the allotments of defaulting members. Powers were given to the committee to make roads, drains, &c., on the land, and powers were given to the trustees of borrowing money on mortgage with the consent of a general meeting. When all mortgages had been paid off and all the allotments had been conveyed the society was to come to an end. The society was not registered under the *Companies Act*, 1862:—

Held, that the society was not an association formed for the purpose of carrying on any business that had for its object the acquisition of gain, and was not made illegal by the *Companies Act*, 1862, s. 4.

Crowther v. *Thorley* (1) followed.

Wigfield v. *Potter* (2) approved.

THE *Abbey Dale Freehold Land Society* was constituted by a deed dated the 11th of November, 1873, made between *George*

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Siddall, William Fox, H. Matthews and *J. Pearson*, of the first part, *J. D. Beckitt* of the second part, the several persons whose names and seals were subscribed and affixed in the third schedule to the deed of the third part, and the above-named *Fox* and *Siddall* of the fourth part. This deed contained recitals to the effect that the parties thereto of the first part became by purchase from *T. Tinker*, and were at the date of the purchase contract hereinafter mentioned, entitled to the lands described in the first schedule and the plan thereto annexed, subject to a mortgage to *Beckitt* for £3000, and to certain interests of *Tinker*, and that the lands were then vested in *T. Tinker*, as trustee for *Beckitt* as mortgagee, and, subject to the mortgage, in trust for the parties of the first part. It further recited that the land had been laid out in allotments numbered 1 to 78 shewn upon the plan, and that certain roads had been laid out and partly formed, and considerable expenditure incurred on the land, and that further expenditure would be required for developing the property as a building estate. It further recited that a voluntary association had been lately formed and constituted, as from the 9th of September, 1873, under the name of the *Abbey Dale Freehold Land Society*, for the purchase of the property from the parties of the first part, and for the resale of the allotments to the members of the society, subject to certain mutual rights of way, and for other purposes for the common benefit of the owners and occupiers of such allotments for the time being, and that such purchase had been agreed to be made upon the terms specified in an indenture of even date made between *Siddall, Fox, Matthews*, and *Pearson* of the first part, *Fox* and *Siddall* of the second part, and the members of the committee of the society other than *Matthews* of the third part, therein referred to as "the purchase contract," and that the seventy-eight allotments had been agreed to be purchased by individual members as shewn in the third schedule. By the witnessing part all the parties confirmed the purchase contract, and agreed that it should be binding on all the members, but not so as to bind the individual members personally, except as regarded the rules contained in schedule 2. Each of the parties of the third part covenanted with *Fox* and *Siddall* as regarded his own allotment, and each of them, *Fox* and *Siddall*,

as regarded his own lot covenanted with the other of them:— (1) "That the said several covenantors now constitute, and have, as from the 9th of September, 1873, constituted, and they, or the respective persons who pursuant to the regulations of the society may become members thereof in substitution for any original members, shall until the termination of the society under such regulations continue to be a society under the aforesaid name for the purposes hereinbefore expressed, and any further purposes which may be expressed in the said 2nd schedule hereto, and subject to the rules, provisions, and conditions therein contained, or which are contained in the body of this deed." By (2) it was provided that the covenantors should perform the rules and make the payments provided for by them. (5) Provided that until payment off of *Beckitt's* mortgage, a certain proportion of the contributions should be invested and applied in payment of the purchase-money, and it was declared that the society was not intended to form a partnership but "an association for the regulated ownership of land in common and the disposition thereof for common purposes, and that no individual member or members of the society shall have any power to contract on behalf of or in any manner to bind the other members thereof, but that all contracts binding on the society must be by the committee or the trustees thereof, under and according to their respective powers in that behalf contained in these presents or in the said 2nd schedule thereto."

By the 2nd of the rules in the 2nd schedule it was provided that monthly meetings of the committee should be held, to receive contributions and transact the general business of the society; and the 3rd provided for the holding annual and special meetings of the society. Rule 4 provided that the society should be managed by a president, vice-president, treasurer, secretary, and a committee of eight members. By sect. 6 actions and other proceedings were to be brought and defended in the names of the trustees, but not without the authority of a special meeting of members. By rule 7 the property of the society was to be vested in the trustees. By rule 16 each person entering the society was to pay 10*s.* entrance money, and each member was to pay for his allotment in each month the sum set against the allotment in the

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3rd schedule, with interest on the amount of his purchase-money remaining unpaid, and was to continue these subscriptions, and pay all fines and other moneys that might become due from him, until the objects of the society had been accomplished, the subscriptions and other moneys being paid to the committee. There was a power to forfeit allotments in case of default in payment of contributions, and a power to pay the whole subscriptions at once, in which case the allottee was to be entitled to an immediate conveyance of his allotment, but was to be liable to "contribute and pay a due proportion of the expenses then incurred or thereafter to be incurred by the society." By rule 17 the committee were authorized to make roads, drains, and other works, and to pay such salary to the secretary, and to incur such other reasonable expenses as they from time to time should think expedient, and generally to do such acts, matters and things as they should think fit, and to debit the expenses to the society. Rule 19 provided for conveyance of their allotments to members who had paid up the purchase-money. Rule 21 provided that "all allotments in this society shall be sold by auction subject to the conditions to be read at the time of sale. The bonus or purchase-money shall go to the general fund of the society." Rule 22 gave power to the members in general meeting to appoint new trustees in case of the death, incapacity, &c., of any of the trustees. Rule 23 gave the trustees power, at the request of the committee, to borrow money on mortgage. Rule 26 contained restrictive provisions as to the class of buildings to be erected on the allotments. Rule 27: "When the amounts borrowed under the powers granted to the trustees by these rules, and all other debts and liabilities of the society shall be paid and discharged, and each member shall have obtained a conveyance of his or her allotment, the society shall terminate, save and except that each member shall continue liable to repair the said fence adjoining his or her allotment as aforesaid, and shall continue liable to an apportioned part of the said roads, ways, or crossings, common sewers, and drains, the liability of each member to the proportion of the expenses of the said roads to cease when such roads shall be dedicated to and become repairable by the inhabitants or authorities of the township in which the same are situate."

The third schedule contained in columns the numbers by which

the allotments were denoted, their respective prices, and the amounts of the monthly instalments payable upon them respectively, and the signatures and seals of the respective allottees, except as to two or three lots against which there was no seal or signature. It did not appear whether these lots had been taken up. The number of persons who executed the deed as parties of the third part were considerably more than twenty. The company was not registered under the *Companies Act*, 1862.

Various allotments were conveyed to the allottees with the concurrence of the mortgagee. The equitable estate in the remaining lots remained vested in *Fox* and *Siddall*, subject to the mortgage to *Beckitt*.

By the purchase contract above referred to the equitable estate in the lands mentioned in the first schedule became vested in *Fox* and *Siddall* as trustees for the society.

Fox died in 1877. *Siddall* in 1884 became of unsound mind, though not found so by inquisition, and at the time of this petition was an inmate of a lunatic asylum.

On the 11th of October, 1884, at a meeting of members duly convened in accordance with the rules, two persons were appointed trustees to fill up the vacancies occasioned by the death of *Fox* and the incapacity of *Siddall*.

The new trustees and the officers and committeemen of the society then presented a petition in Lunacy, praying that such parts of the lands as remained subject to the trusts of the deed might vest in the new trustees for the estate then vested in *Siddall*.

The petition came on to be heard on the 29th of November, 1884, and again on the 15th of December, 1884. The Court thought that the society, as it consisted of more than twenty members and had not been registered, was illegal, and declined to make any order. The attention of the Court however having subsequently been called to two cases which had not been mentioned, directed the petition to be put into the paper again. It accordingly came on again on the 19th of January, 1885.

Byrne, for the Petitioners:—

This is not a society for the purpose of gain. There is no

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provision for the division of money. When the mortgages are paid off and the allotments have been conveyed to the members the society is to come to an end.

[BAGGALLAY, L.J. :—There is a forfeiture clause, then a general provision that allotments are all to be sold by auction, and that the moneys shall go to the general fund. Would not the members be entitled to have any surplus divided among them ?]

It would only be a division of their own money among them. If there is a business carried on it is carried on by the trustees as trustees and not as agents. In *Smith* v. *Anderson* (1) a society for the purpose of investment was held not to require registration. In *Wigfield* v. *Potter* (2) a society very like the present was held not to require registration, for that it was not a society carrying on business for the purpose of gain. This case was recognised in *Crowther* v. *Thorley* (3) before the Court of Appeal.

BAGGALLAY, L.J.:—

I do not propose to go into the details of this case, because I am of opinion that we are bound by the decision of the Court of Appeal in *Crowther* v. *Thorley*, from which I cannot distinguish the present case. The case of *Smith* v. *Anderson* is also binding upon this Court. I must confess that, if I had had to decide *Smith* v. *Anderson*, I possibly should not have entirely agreed with all that was decided in it. My views would to some extent have gone with those of the late Sir *George Jessel*, whose decision was reversed. However, *Smith* v. *Anderson* stands, and also *Crowther* v. *Thorley*, which was decided by the other branch of this Court.

In the present case it is proposed to appoint new trustees of a freehold land society. The society was formed under the name of the *Abbey Dale Freehold Land Society* in September, 1873, and, without going more into details, I may say that certain land, which was then held by a gentleman of the name of *Tinker*, subject to a mortgage to a Mr. *Beckitt*, was, in fact, declared to be held by him in trust for certain persons, who were the first trustees of this society. Thus far there could be no difficulty in the case.

(1) 15 Ch. D. 247. (2) 45 L. T. (N.S.) 612.
(3) 32 W. R. 330.

Then it went on to provide that these trustees should themselves hold the interest which they acquired by virtue of the earlier declaration of trust, upon trust for the various persons who had become members of this association and whose number undoubtedly exceeded twenty. The opinion entertained by those members of this Court, of whom I was one, who were present when this petition was first brought on, was that this could hardly be regarded otherwise than as a business carried on for the purposes of gain, and that if so, it was an illegal business under the 4th section of the *Companies Act* 1862, and that this Court could not lend its assistance to make an order vesting the property in trustees who were to hold it for illegal purposes. After we went out of Court our attention was called to *Crowther* v. *Thorley* (1) and *Wigfield* v. *Potter* (2), and we then entertained some doubt as to whether we were right in the view which we had taken. We therefore directed the petition to be placed in the paper again to be more fully argued. Mr. *Byrne* has evidently taken great pains in getting up the subject, and has not only drawn our attention very carefully to the nature and constitution of the association and the rules by which it was governed, but to the cases of *Smith* v. *Anderson* (3), *Crowther* v. *Thorley*, and *Wigfield* v. *Potter*. It appears to me that *Crowther* v. *Thorley* approaches so closely in its circumstances to the circumstances of this case that, whatever may be my own private opinion as to the view which ought to be taken in this case, I am bound by that decision. It having been established that one of the trustees had died, that the other was of unsound mind, and that, according to the rules of the society, certain gentlemen were duly appointed to supply their places, I think that the vesting order should be made as asked by the prayer of the petition.

I wish to express my obligations to Mr. *Frank Evans* for having kindly referred me to the cases of *Crowther* v. *Thorley* and *Wigfield* v. *Potter*.

BOWEN, L.J.:—

I am of the same opinion. It seems to me that the case is governed by *Crowther* v. *Thorley*. If that case was rightly

(1) 32 W. R. 330. (2) 45 L. T. (N.S.) 612. (3) 15 Ch. D. 247.

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decided (and we must assume that it was rightly decided) then, whether there was here any object such as the acquisition of gain to the individual members or not, there was no carrying on of a business within the meaning of sect. 4 of the *Companies Act*.

FRY, L.J.:—

I am unable to find any distinction between this case and *Crowther* v. *Thorley* (1), and being bound by that case I concur in the judgment which has been expressed by the learned Judges.

Solicitors: *Ridsdale & Son.*

H. C. J.

C. A. 1883 CHITTY, J. *Nov.* 12, 13, 21. C. A. 1885 *Jan.* 27, 28.

LYBBE *v.* HART.

[1883 L. 760.]

Bankruptcy—Disclaimer by Trustee in Liquidation—Lease—Covenant not to use Hay, Straw, &c.—56 *Geo.* 3, *c.* 50, *s.* 11 [*Revised Ed. Statutes, vol. v., p.* 452]—*Bankruptcy Act*, 1869 (32 *&* 33 *Vict. c.* 71), *ss.* 119, 125.

The enactment in statute 56 Geo. 3, c. 50, s. 11, that the assignee of any bankrupt shall not take or use any hay, straw, &c., on any farm of the bankrupt in any other way than the bankrupt ought to have done, is still in force, and applies to a trustee in bankruptcy or liquidation under the *Bankruptcy Act*, 1869.

A lessee was bound by the covenants in his lease not to sell the hay, straw, &c., grown on his farm without the consent of the landlord. The lessee became a liquidating debtor under the *Bankruptcy Act*, 1869, s. 125, and the trustee in the liquidation disclaimed the lease:—

Held, that the trustee was bound by 56 Geo. 3, c. 50, s. 11, notwithstanding the disclaimer, and an injunction was granted to restrain him from selling the hay, straw, &c., grown on the farm.

BY an indenture of lease dated the 10th of April, 1876, the Plaintiff, *P. Lybbe Powis Lybbe*, demised a farm and land to *J. F. M. Hawkins* for twenty-one years from Michaelmas, 1875, at the yearly rent of £184. The lease contained covenants by the lessee, among other things, to stack and thrash out on the farm all crops grown thereon: not to sell without permission in writing by the landlord or his agent the hay, straw, stubble,

(1) 32 W. R. 330.

haulm, fodder, chaff, roots, or any green crops (except the hay grown from the pasture lands, of which one half the proceeds of such sale should be returned to the farm to be consumed by cattle or sheep in the shape of oil, cotton, or rape cake in the same year in which such hay should be sold off), but to spend and consume the same on the said farm (except the hay grown in the last year of the term, which was to be offered to the reversioner or the incoming tenant at a market price to be ascertained by valuation in the usual way, or if not taken by one of them the tenant was to be at liberty to remove or sell the same), and the dung, muckle, and compost arising therefrom to carry out on the said farm, except that arising from the two last years' crops, which were to be left for the reversioner or the incoming tenant (except so much thereof as might be fairly applied by the outgoing tenant for rape and turnips in due course for wheat).

On the 24th of November, 1882, *J. F. M. Hawkins* presented a petition for liquidation or composition under the provisions of the *Bankruptcy Act*, 1869.

On the 14th of December, 1882, a resolution was passed by the creditors of *Hawkins* for the liquidation of his affairs by arrangement and not in bankruptcy, and the Defendant, *P. Hart*, was appointed trustee in the liquidation. The resolution was registered, and the certificate of the appointment of the trustee was given on the 15th of December, 1882.

On the 3rd of March, 1883, the Defendant, in pursuance of leave given by the Court, formally disclaimed the lease of the 10th of April, 1876, and the Plaintiff afterwards re-entered on farm.

The Defendant having threatened to remove the hay, straw, green crops, and other produce mentioned in the covenant from the farm, the Plaintiff brought the present action on the 7th of March, 1883, to restrain him from removing the same or disposing of them otherwise than by spending and consuming the same on the said farm.

It was admitted that a portion of the hay mentioned in the statement of claim had been grown on the pasture-lands. An injunction was granted on the 20th of March, 1883, which was upheld by the Court of Appeal on the 4th of July, but it was then

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arranged that the Plaintiff should take the hay and straw grown upon the farm, and should pay the Defendant a sum fixed by valuation for the hay and straw consumed by the Plaintiff, the hay grown from the pasture-lands being taken at market price, and the remainder of the hay and straw at feed or spending price.

The Defendant demurred to the statement of claim on the ground that, by the disclaimer of the 3rd of March, 1883, the lease of the 10th of April, 1876, was, together with the covenants therein contained, absolutely put an end to as from the 15th of December, 1882, the date of the registration of the resolution for liquidation of the lessee's affairs; and further, that the Plaintiff had now no right under covenant or by common law or by force of any statute, or otherwise, to restrain the Defendant from selling or removing from the said farm and premises the produce of the farm, or to have the same produce spent or consumed on the farm.

By arrangement the hearing of the demurrer was treated as the trial of the action.

The action came on for trial before Mr. Justice *Chitty* on the 12th of November, 1883.

Cooper Willis, Q.C., and *H. Fellows*, for the Defendant, contended that the covenants in the lease had been put an end to by the disclaimer; and cited *Ex parte Hart Dyke* (1); *Ex parte Glegg* (2); *Ex parte Allen* (3); *Silcock* v. *Farmer* (4); 56 Geo. 3, c. 50, s. 11 (5); the *Bankruptcy Act*, 1869, ss. 14, 17, 18, 20, 125,

(1) 22 Ch. D. 410.
(2) 19 Ch. D. 7.
(3) 20 Ch. D. 341.
(4) 46 L. T. (N.S.) 404.
(5) The 56 Geo. 3, c. 50, s. 11, is as follows:—"And be it further enacted, that no assignee of any bankrupt, or of any insolvent debtor's estate, nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock or crops, of any person or persons engaged or employed in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw, grass or grasses, turnips or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed, or other dressings intended for such lands, and being thereon, in any other manner, and for any other purpose, than such bankrupt, insolvent debtor, or other person so employed in husbandry, ought to have taken, used, or disposed of the same, if no commission of bankruptcy had issued, or no such assignment or assignments had been executed, or sale made."

sub-s. 7; the *Bankruptcy Repeal and Insolvent Court Act*, 1869; the *Statute Law Revision Act*, 1873 (36 & 37 Vict. c. 91), sched. 1.

Macnaghten, Q.C., and *Terrell*, for the Plaintiff, contended that the covenants in the lease were absolute and personal, and in no way affected by the disclaimer. They referred to the *Bankruptcy Act*, 1869, s. 23; the *Bankruptcy Act*, 1883, s. 55; *Ridgway* v. *Lord Stafford* (1); *Attorney-General* v. *Cox* (2).

CHITTY, J.:—

This case originally came on for argument on demurrer, but by arrangement between the parties the hearing on demurrer was treated as the trial, the facts stated in the statement of claim being accepted as true except as to a portion of the hay, which it is admitted consisted of hay grown on pasture land. By agreement also between the parties the lease itself was considered as put in evidence.

The first question is as to the covenant. It is an absolute covenant "not to sell without permission in writing by the landlord or his agent, the hay, straw, stubble, haulm, fodder, chaff, roots, or any green crops," then comes the exception to which I have referred: "Except the hay grown from the pasture lands of which one half the proceeds of such sale shall be returned to the farm to be consumed by cattle or sheep in the shape of oil, cotton or rape cake, in the same year in which such hay shall be sold off." The exception falls in a parenthesis, and the covenant then proceeds, "but to spend and consume the same on the said farm." That is the covenant so far as it relates to not selling; it is unlimited in point of time, and not confined, as was contended by the Defendant, to the duration of the lease itself. The words "during the said term" which occur at the commencement of the covenant to pay rent, do not conclusively or by fair construction refer to the other covenants, as is apparent from the language of the lease itself, and also from the substance of some of the covenants which follow. The meaning of the covenant not to sell is, in my opinion, not to sell off the farm. That is shewn by the exception, which speaks of selling off.

(1) 6 Ex. 404. (2) 3 H. L. C. 240, 275.

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With regard to the excepted hay, it is admitted by the arrangement made between the parties, that the landlord can only take that at what has been agreed to as the market price, that having been ascertained by a person specially appointed for the purpose. The question then which I have to consider relates to the hay and the other matters mentioned, except the hay grown on the pasture land. The covenant has reference to chattels which were not so at the inception of the lease, but became so by severance. Such a covenant is a personal covenant, and does not run with the land comprised in the lease so as to bind the assignee of the lease, nor does it run at common law with the chattels so as to bind the assignee of the chattels. The same principle of common law applies where the chattels are in existence at the date of the lease itself, as in the familiar instance given in *Spencer's Case* (1), of a flock of sheep or a sum of money; and where the chattels come into existence subsequently, as by severance, as is shewn by the case of *Ridgway* v. *Lord Stafford* (2), where Chief Baron *Pollock*, in delivering the judgment of the Court, says, "A covenant to expend the produce upon the land is a covenant that cannot run with a chattel; and it is quite plain that the tenant himself would have the power to sell without such a condition, but would only be liable to his landlord for a breach of covenant."

That was the state of the law when the statute 56 Geo. 3, c. 50, was passed. That Act is entitled "An Act to regulate the sale of farming stock taken in execution," and the preamble is as follows: "Whereas it is expedient that the execution of legal process should be so regulated, as to be consistent with good husbandry, and the effect and intent of covenants and agreements entered into between the owners and occupiers of land let to farm." It has been held on the construction of the 11th section of that Act—which is the Act I have chiefly now to consider—that the 11th section does not apply exclusively to purchasers on sales by the sheriff under execution. That was decided in *Wilmot* v. *Rose* (3). The 11th section embraces every mode of alienation except the assignment which takes place on death,

(1) 1 Sm. L. C. 8th Ed. p. 70.
(2) 6 Ex. 404, 406.
(3) 3 E. & B. 563.

when the property passes to the legal personal representative. That case is not mentioned in the section, because the legal personal representative would be bound at law by the covenant of the tenant himself. Neither does the section include the case of a gift of chattels. That may be either because the Legislature thought the case of a gift was so rare that it was not necessary to legislate with reference to that subject, or because the Legislature was satisfied that the Courts of Equity would interfere against the mere voluntary donee by way of injunction.

The 11th section applies in express terms to general assignees; that is to say, the general assignee in bankruptcy and the general assignee in insolvency; and it applies also to particular assignees, first, the assignee by a bill of sale, and secondly, the purchaser. The mischief which the Legislature intended to remedy was the injury to good husbandry likely to arise from the attempt of the assignee to use the chattel in a manner different from that in which the tenant himself would have used it. The effect of the enactment is, in my opinion, to transfer the obligation to the assignee of the chattel; or, in other words, to annex the obligation to the chattel in the hands of the assignee.

It was argued by the Defendant that the 11th section does not apply to the trustee in bankruptcy under the Act of 1869, and, *à fortiori*, not to the trustee in liquidation under the same Act. For the purposes of this case it appears to me that there is no difference in substance between the assignee in bankruptcy as the law stood at the date of the passing of the Act of Geo. 3, and as the law now stands with regard to the trustee in bankruptcy under the Act of 1869. The trustee in bankruptcy is the assignee of the lease, and is the assignee of the chattel, though the mode of assignment is now somewhat different because the property is vested in him by express statutory enactment instead of by the statutory effect of an assignment executed by the debtor. The mere change of name—the substance remaining the same—appears to me to be quite insufficient to support the argument of the Defendant.

The point, however, does not depend on this consideration alone, for in the year 1873, that is after the *Bankruptcy Act*, 1869, had been passed, the Legislature repealed in express terms the

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11th section of the Act of Geo. 3, so far as it related to the assignee of an insolvent debtor's estate. The reason of this express repeal was that the special law as to insolvency had been put an end to. A few cases of assignees in bankruptcy might, but for the repealing Act, have still remained; but it appears to me that it would be a narrow view to hold that the Legislature intended that the 11th section should be kept on foot, so far as bankruptcies were concerned, with reference only to those few cases where the bankruptcy had not been wound up under the previous law, and not to the general and far more numerous cases of bankruptcy under the Act of 1869.

Apart from the general consideration arising from the nature of the enactment itself—the 11th section of the Act of Geo. 3—the inference to be drawn from the limited repeal is, I think, that the Legislature considered the statute would still apply to bankruptcy, otherwise it is remarkable that there should have been no express repeal of the statute with reference to bankruptcy.

I may mention that in the Act which has not yet come into operation, I mean the Act of last session (46 & 47 Vict. c. 52), there is no express repeal of the 11th section of the statute of Geo. 3.

If the argument which is founded on the precise phraseology of the 11th section of the Act of Geo. 3 were the correct one, it would follow that the 11th section was practically repealed, as to bankruptcy, so soon as the commission in Bankruptcy was abolished, and the new law substituted, the concluding words of the section being, "if no commission of bankruptcy had issued." It appears to me that this contention could not be supported, and I hold that the 11th section of the statute of Geo. 3 still continues to apply to a trustee in bankruptcy; and that, having regard to the 125th section of the *Bankruptcy Act*, 1869, there is no difference, for the purposes of the question which I am now considering, between the trustee in bankruptcy and the trustee in liquidation; and further, it makes no difference, in my opinion, that the trustee in bankruptcy and the trustee in liquidation are empowered by the Act of 1869 to disclaim under the 23rd section.

But then, again, with reference to the question whether the

11th section of the statute of Geo. 3 applies to a trustee in bankruptcy who has not in fact disclaimed under the 23rd section, the Defendant contends it does not apply, which is in fact a contention that the 11th section of the statute of Geo. 3 is by implication repealed by subsequent and recent legislation. When the repeal is not express the burden is on those who assert that there is an implied repeal to shew that the two statutes cannot stand consistently the one with the other. The words of the 23rd section of the Act of 1869 have given rise to serious difficulties.

In the case before me it is plain that an injunction could have been granted against the tenant if he had threatened to sell or remove the goods themselves which passed to the trustee in bankruptcy. The property in the goods is vested in the trustee, as he has not disclaimed the goods. In my opinion, on the true construction of the 23rd section, it was competent for the trustee to have disclaimed the goods. The important words of the section are these, "Other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act." Those words would apply, in my opinion, after what I have said with reference to the 11th section of the Act of Geo. 3, to the goods in question. Had the trustee disclaimed, he would have escaped from the liability or obligation which had been transferred to him by the operation of the 11th section of the statute of Geo. 3. A disclaimer of a lease which is to be deemed, under the 23rd section, to have been surrendered, does not put an end to all the covenants. This is shewn, for instance, by the case of *Attorney-General* v. *Cox* (1), where Lord *Cottenham* says (2): "The personal covenant is independent of the estate in the property mortgaged, and is not affected by its surrender or other determination."

Then is the personal covenant gone by the disclaimer, having regard to the 11th section of the statute of Geo. 3? Is the special provision of that statute, which makes the covenant binding on the assign, swept away by the 23rd section of the Act of 1869? The precise question is not covered by authority. In *Ex parte Hart Dyke* (3) the question apparently did arise, though

(1) 3 H. L. C. 240. (2) 3 H. L. C. 275.
(3) 22 Ch. D. 410.

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it was not decided, the matter having been compromised, for the Master of the Rolls says this (1): "This determines all the questions between the parties, except a very small question as to some hay and straw, said by the respondents to be worth £23, and said by the appellant to be worth something more, which was cut, not in the last year of the tenancy, but in the previous year." As to that, he makes some observations on the case of *Silcock* v. *Farmer* (2). He states he is not quite convinced that he knows the ground of that decision, but of course *Silcock* v. *Farmer*, being a case decided by the Court of Appeal, is binding upon me. The Master of the Rolls then says: "But it appears to me quite clear that what is offered by the respondents is quite right, that is, that the landlord shall take that portion of the hay"—the hay cut in the previous year—"at feed prices, because in that way he will get the benefit of the arrangement. That portion should have been consumed on the premises by the tenant. I am satisfied that that is a just offer."

In that case the covenant was not, as was pointed out by Lord Justice *Cotton* in his judgment, and agreed to by Lord Justice *Bowen*, an absolute covenant, or a covenant upon which an injunction would have been granted. Lord Justice *Cotton* says (3): "There is not an absolute covenant not to remove the hay and straw, but only a covenant providing for the cultivation during the continuance of the term, and providing for the mode in which the hay and straw which could not be used in ordinary course on the farm, namely, that grown in the last year, should be dealt with. In my opinion, there is not here, as there was in *Silcock* v. *Farmer*, an absolute covenant not to remove the hay and straw at any time, and I think, therefore, that case does not apply."

On the true construction of the two statutes—the statute of Geo. 3 and the *Bankruptcy Act*, 1869—I come to the conclusion that this personal covenant still remains binding upon the trustee, and that the onerous obligation imposed by the statute of Geo. 3 upon the trustee, who is the assignee, is not removed by his disclaimer of the lease under the 23rd section of the *Bankruptcy Act*, 1869, and there will therefore be an injunction as asked by the statement of claim. That disposes of the case.

(1) 22 Ch. D. 426. (2) 46 L. T. (N.S.) 404. (3) 22 Ch. D. 428.

With regard to the hay which has been taken from the pasture lands, the landlord under the arrangement which has been made must pay for that at the market price. With regard to the other hay and straw, the landlord has offered to take them at a feed price. There would have been an injunction, in my opinion, as to these chattels also had there not been such a reasonable offer, because otherwise there would have been an attempt on the part of the landlord to get unfairly for his own benefit property belonging to the trustee in bankruptcy.

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G. I. F. C.

From this decision the Defendant appealed. The appeal came on for hearing on the 27th of January, 1885.

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Cooper Willis, Q.C., and *H. Fellows*, for the Appellant :—

The covenant is not one which runs with the land, therefore the hay, straw, &c., passed to the trustee in the liquidation, and the only remedy of the landlord if there had been no disclaimer would have been to prove in the liquidation for damages. The statute 56 Geo. 3, c. 50, which enacts that the assignee under a commission of bankruptcy shall not take any hay, straw, &c., which the lessee ought not to have taken does not apply to a trustee in liquidation. It does not apply to a trustee in bankruptcy under the Act of 1869. An adjudication of bankruptcy is different from a commission, and a trustee is different from an assignee. *À fortiori* it does not apply to a trustee in liquidation. The resolution of the creditors was that the estate should not be wound up in bankruptcy. It is a totally distinct procedure, though it is regulated by analogous rules.

If the Act of Geo. 3 is applicable, its effect is destroyed by the disclaimer. The covenant is limited by the duration of the lease. The lease is to be deemed to have been surrendered as from the appointment of the trustee, and all the obligations under it come to an end: *Ex parte Glegg* (1); *Ex parte Allen* (2); *Ex parte Hart Dyke* (3); *East and West India Dock Company* v. *Hill* (4).

(1) 19 Ch. D. 7.
(2) 20 Ch. D. 341.
(3) 22 Ch. D. 410.
(4) 22 Ch. D. 14; 9 App. Cas. 448.

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Macnaghten, Q.C., and *Terrell*, for the Plaintiff:—

An adjudication of bankruptcy is substituted by the *Bankruptcy Act*, 1869, for a commission in bankruptcy, and a trustee is substituted for an assignee. All statutes which affected assignees in bankruptcy apply now to trustees in bankruptcy. That 56 Geo. 3, c. 50, applies to bankruptcies under the *Bankruptcy Act*, 1869, is clear from the *Statute Law Revision Act*, 1873 (36 & 37 Vict. c. 91), which repeals 56 Geo. 3, c. 50, s. 11, so far as it relates to an assignee of an insolvent debtor, but leaves it still in operation as to the estates of bankrupts. Then by the *Bankruptcy Act*, 1869, s. 125, sub-ss. 5 and 7, trustees in liquidation are put on the same footing as trustees in bankruptcy. It therefore follows that a trustee in liquidation is bound by the Act of Geo. 3. That being so, the disclaimer cannot give the trustee any right to the hay, straw, &c. If the lessee had surrendered his lease before the liquidation, he would have had no right to these things, and by the terms of the Act the trustee cannot now be in a better position than he would have been.

Cooper Willis, in reply.

BAGGALLAY, L.J.:—

In this action the lessor is the Plaintiff, and the trustee in liquidation of the lessee is the Defendant, and the substantial question involved is as to the rights of the lessor on the one hand, and of the liquidating trustee on the other hand, to the value of certain hay and green crops which were upon the premises at the time of the appointment of the trustee, and which have been subsequently consumed upon the property of the lessor; and that depends upon the question what were the rights of the parties in respect of the property so consumed. The lease appears to have been granted in 1876 for twenty-one years, and it contained, amongst other provisions, a covenant which does not appear to me to have been very skilfully or carefully drawn. It is in the terms I am about to read. [His Lordship read the covenant set forth above, and proceeded:—]

Without going into the details of the law as they have been from time to time expounded with reference to a covenant of this

kind, I think that it is a covenant which does not run with the land, so as to be in any way attached to the land, nor does it run with the crops, if I may use that expression. In other words, it appears to me that, independently of the statute of Geo. 3, upon the determination of the lease by bankruptcy (and I am using the word bankruptcy now in its general meaning), neither the lessor nor the lessee could derive benefit from covenants of this kind which are contained in the lease. If there had been any breach of those covenants by the lessee, the right of the lessor would be to prove in respect of the damages sustained by him in respect of the breach of the covenant. A variety of cases have been referred to in the course of the argument, which I do not propose to refer to in detail. *Ex parte Glegg* (1) and *Ex parte Allen* (2) were specially mentioned. Those cases were both cases in which, if the covenant could have been treated as running with the land, the lessor would have derived benefit from it under the circumstances of the bankruptcy. The general principles are enunciated by Sir *George Jessel* in the case of *Ex parte Hart Dyke* (3). Speaking of the effect of a disclaimer, he refers to the two cases which had been decided by the Court of Appeal, *Ex parte Glegg* and *Ex parte Allen*, and he says (4): "It puts an end to the lease, not merely to the term, but to the lease itself. On the one hand, therefore, it deprives the landlord of future benefit of all those clauses of the lease which give him a benefit; and, on the other hand, it deprives the tenant of the future benefit of all those clauses of the lease which give him a benefit."

That stated I think the general principle applicable to cases of this kind, and I am of opinion that if there had been a surrender of the lease immediately before the passing of the Act of 56 Geo. 3, the case would have been such as I have already stated. The landlord could not have claimed any right whatever as against the particular hay and crops upon the farm, but he would have been entitled to prove in the course of the bankruptcy in respect of the damages he sustained.

In dealing with this question I think it better to take the

(1) 19 Ch. D. 7.
(2) 20 Ch. D. 341.
(3) 22 Ch. D. 410.
(4) Ibid. 425.

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legislation chronologically in the order in which it has taken place. If this question had arisen just after the passing of the Act of 56 Geo 3, c. 50, what would have been the effect of the 11th section upon such a case? The section is governed by the preamble of the Act, which says, "Whereas it is expedient that the execution of legal process should be so regulated, as to be consistent with good husbandry." Now of course it would not be consistent with good husbandry that those crops, which, according to the terms of the lease, ought to be consumed upon the land with a view to the benefit of the succeeding crops, should be seized and carried away; that is to say, that upon the bankruptcy of the lessee the assignee of the bankrupt should step in and carry off all those crops, treating them as part of the assets of the lessee and leave the lessor to his proof in respect of damage. Therefore it was for the purposes of good husbandry that this Act was passed. Then sect. 11 says, "Be it further enacted, that no assignee of any bankrupt, or of any insolvent debtor's estate, nor any assignee under any bill of sale, nor any purchaser of the goods . . . shall take, use, or dispose of any hay, straw, grass or grasses, or turnips or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed, or other dressings intended for such lands, and being thereon, in any other manner, and for any other purpose, than such bankrupt, insolvent debtor, or other person so employed in husbandry, ought to have taken, used, or disposed of the same, if no commission of bankruptcy had issued" and so on. Therefore there was a protection as far as regards that particular class of chattels, viz., the crops which were produced upon the farm. This Act introduced the protection that, though according to law, or according to the interpretation of the law before this Act passed, those crops would have passed to the trustees in bankruptcy, or the assignee, as he then was, in bankruptcy, henceforth they were not to be used or disposed of otherwise than in a way in which they would have been used if there had been no commission of bankruptcy; that is to say the provisions of the lease would have to be followed, and the crops would have to be consumed upon the premises, or, in other words, their value would be treated as if they had been so consumed.

That is how the matter would have stood if this bankruptcy or

liquidation had occurred immediately after the Act of 56 Geo. 3. But now we have to travel a good many years forward and come down to what is the effect of the *Bankruptcy Act*, 1869, because that Act contains in its 23rd section this provision: "When any property of the bankrupt acquired by the trustee under this Act consists of land or any tenure burdened with onerous covenants" (I omit the other things mentioned) "the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall . . . . if the same is a lease be deemed to have been surrendered on the same date," that is, the date of the order of adjudication. Now in this case the order of adjudication, or that which is equivalent to an order of adjudication the certificate of the appointment of the trustee in liquidation, was made on the 15th of December, 1882, and on the 3rd of March, 1883, the trustee in liquidation disclaimed. The effect of that disclaimer was that the matters were to be treated as if there had been a surrender on the date of the filing of the certificate of the appointment of trustee.

What would be the effect of that disclaimer? If the Act of 56 Geo. 3 was no longer in force, I think that the case which was presented to us on the part of the Appellant here would have been well founded. The argument here was, that the Act of 56 Geo. 3 did not apply, that the circumstances were changed, that proceedings in bankruptcy were no longer the same as they were at the time when that Act passed, and that you would have to be guided solely by the provisions of the 23rd section of the Act of 1869. I should adopt that view if the first point in the argument was well founded, viz., that the Act of Geo. 3 was no longer in force, but in my opinion that Act is in force; that Act remained in force, and remains in force to this day, and that being so, you must read the 23rd section of the Act of 1869 in connection with that Act of 56 Geo. 3. I need not now advert to the various changes which have from time to time been made as regards the vesting of the property of a bankrupt in commissioners and assignees and official assignees and trustees; I should consider

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them all a succession of interests from the one to the other; for I think that the question is set at rest by the 119th section of the Act of 1869, which is in these terms: "Where in any Act of Parliament, instrument, or proceeding passed, executed, or taken before the commencement of this Act mention is made of a commission of bankruptcy or fiat in bankruptcy, the same shall be construed, with reference to the proceedings under a petition for adjudication of bankruptcy, as if a commission of or a fiat in bankruptcy had been actually issued at the time of the presentation of such petition." Why was there any reference to these two previous forms of proceedings in bankruptcy which were in force before the Act came into operation? The 11th section of the Act of 56 Geo. 3 expressly points to what is to be done in the event of there being a commission in bankruptcy. Of course there could be no assignee in bankruptcy at that time unless there had been a commission.

I have come to the conclusion that the Act of Geo. 3 still remains in force, and must be construed together with the 23rd section of the Act of 1869, and though according to the Act of 1869 certain consequences follow upon a disclaimer being equivalent to a surrender—as affecting a variety of other things—as regards those particular items of hay, straw, and green crops on a farm, the Act of 1869 does not leave the trustee in bankruptcy free from the operation of the provisions of the Act of Geo. 3. In fact, practically it is an exception from the generality of the Act of 1869.

But then comes the next question, and it is to my mind a question that is a little more difficult than either of those I have dealt with yet. Is the same rule to apply to a trustee in liquidation where there is no bankruptcy? I think in considering that question, we must have recourse to the 125th section of the *Bankruptcy Act*, 1869, and to the various sub-sections of that section; the first which appears to me to be important is the 5th: "All such property of the debtor as would, if he were made bankrupt, be divisible amongst his creditors shall, from and after the date of the appointment of a trustee, vest in such trustee under a liquidation by arrangement, and be divisible amongst the creditors, and all such settlements, conveyances, transfers, charges, payments,

obligations, and proceedings as would be void as against the trustee in the case of a bankruptcy shall be void against the trustee in the case of liquidation by arrangement."

Now here is a very strong indication indeed of the intention of the Legislature to place the trustee in liquidation, as far as regards his duties, his obligations and powers generally, in the same position as that in which by the same Act the trustee in bankruptcy is placed. But I think that is made more clear by passing on to the 7th sub-section, for that sub-section provides that "the trustee under a liquidation shall have the powers, and perform the same duties, as a trustee under a bankruptcy," and then "with the modification hereinafter mentioned, all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word 'bankrupt' included a debtor whose affairs are under liquidation." Now really I can read that section in no other way than as indicating that to all intents and purposes the trustee in liquidation is to be placed in the same position as a trustee in bankruptcy. Instead of actual proceedings to liquidate the estate in bankruptcy, with all its particular forms and incidents, involving considerable expense, there may be a liquidation by arrangement, but in that case the trustee in the liquidation proceedings is to all intents and purposes placed in the same position as a trustee in bankruptcy would have been in, if there had been a bankruptcy instead of a liquidation by arrangement. If, then, I am right in what I have already decided, that the trustee in bankruptcy would be bound by the provisions of the Act of Geo. 3, notwithstanding the provisions of the 23rd section of the Act of 1869, it follows that the trustee in liquidation is in exactly the same position as the trustee in bankruptcy would be for the reasons I have now mentioned.

This no doubt is a case of some considerable complication and involves various provisions. I am not aware of any case which has yet entirely raised the question which has been raised here, but I think it is a matter of inference from the various cases which have been referred to, that the proposition which I have stated should be affirmed. As regards the application of these decisions to the particular case we have under consideration,

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there was some little further question. The action was commenced by the landlord asking for an injunction restraining the Defendant, the trustee in liquidation, from removing the hay and straw and green crops from the farm. An injunction was granted in the first instance. From that injunction there was an appeal to this Court, and then an order was made by consent, the practical effect of which appears to be that the landlord came under the undertaking to pay to the Defendant the market price of the hay, straw, stubble, &c., on the farm and premises, or any of them as to which (if any) the Court at the trial of the action should consider that the Plaintiff's claim thereto was ill-founded. Then the Court ordered that the Plaintiff should be at liberty to use the same. And the provision was added that a gentleman named in the order should value the hay, straw, &c., at a feed price and at the market price on the 20th of March, 1883. They were so valued, and the feed price and the market price ascertained. Then the matter came on to be heard before Mr. Justice *Chitty* upon the 12th of November, 1883, and it was agreed that it should be treated as the hearing of the action, though in point of fact it really came on on demurrer. First of all there was an injunction granted against the Defendant restraining him from selling or removing any of those crops, which has practically become inoperative, because the crops were actually consumed by the landlord; and the order went on to provide that the Plaintiff in pursuance of his undertaking should pay a certain sum of money, being the agreed value of the crops grown from the pasture lands being taken at market price, and the remainder taken at feed price. This order will be affirmed, and the appeal dismissed with costs.

BOWEN, L.J.:—

I should like to add a few words on the construction of the statute.

The question here, as the Lord Justice has pointed out in detail (I will not again go over ground which he has so clearly made good), arises between the landlord and the trustee of a debtor liquidating by arrangement. Therefore the difficulties which arise divide themselves into two branches, first, what would

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be the law supposing this was a case not of the trustee of a liquidating debtor but the trustee of a bankrupt; and, secondly, whether there is any legislation which applies so as to change the law in such a case as applied to a liquidating debtor.

The landlord is seeking to enforce the 11th section of 56 Geo. 3, c. 50, against the trustees of a debtor after a disclaimer. I propose, therefore, first to consider very shortly whether this could be done after a disclaimer against the trustee of a bankrupt. The words of the section, which are contained in an Act which was passed for the benefit of agriculture, prevent the assignee of a bankrupt from taking any crop in any way which the bankrupt himself would not but for the bankruptcy have been able to take. Now *primâ facie* but for the bankruptcy the lease would have subsisted. The bankrupt who is tenant could not have carried away his hay. The section therefore would strike directly at the power of the bankrupt's trustee quite irrespectively of anything else, and would prevent him from removing anything whatever which the person whose estate devolved upon him could not have originally removed. What difference can the disclaimer under the 23rd section of the *Bankruptcy Act* make? Is there anything which destroys the effect of that language and its operation upon the bankrupt or his trustee? The particular covenant with which we have to deal here is drawn in terms which I will not call ambiguous because I have formed a clear opinion as to what they mean; but it is not at all a well drawn covenant. It is a covenant not to sell or remove the hay and other things. The true effect is, I think, that it is a general covenant not to remove at any time. But be it observed it is not a covenant the fulfilment of which depends upon the continuance of the term, nor is it a covenant the operation of which depends upon or which only arises upon the peaceful expiration of the term, nor is it a covenant or obligation which only would arise upon the violent arrest or forfeiture of the term. It is perfectly general. What is the effect of the disclaimer upon that? The best definition, I think, which we may go to now is that given in the House of Lords in *Hill* v. *East and West India Dock Company* (1). The effect of this disclaimer under sect. 23 is to put an end to the lease from the

(1) 9 App. Cas. 448.

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date of the order of adjudication, or appointment of trustee in the case of a liquidating debtor, so far as is necessary to give effect to the provisions of the statute and to bring the bankrupt and his estate within the beneficial operation of this section.

Now what effect has that upon this covenant? No party can have the benefit after the disclaimer of provisions which depended upon the continuance of the lease, or which depend upon the peaceful expiration of the lease, or upon the violent forfeiture or violent arrest of the term. But can it be that it also puts an end to the obligation which is contained in a covenant like this, and which is perhaps a little different in law from that which was in question in the case which has been cited? But it is not in the least necessary to decide what it does, because whatever it does it certainly does not affect the operation of sect. 11 of 56 Geo. 3. Assuming that the lease is to be determined even to the extent of determining the obligation of this covenant, still, if there had been no bankruptcy, the tenant could not have removed his hay, and the statute remains, which says that the trustee in bankruptcy shall not be able to do any more than the tenant could have done before the bankruptcy. Therefore giving the widest effect to the disclaimer you can, it does not seem to me to touch this section.

If that is the law as regards the trustee of a bankrupt then comes a much more difficult question. How do you bring the trustee of a liquidating debtor within the purview of a section which only deals with the assignee of a bankrupt? The liquidating debtor *primâ facie* is not a bankrupt nor is his trustee the assignee of a bankrupt; how do you get over it? It is obvious that the greatest inconvenience and mischief would follow if you were to have one law for the trustee of a bankrupt as regards this agricultural land and another for the trustee of a liquidating debtor. It would be a monstrous legislative absurdity. There is no law that if a man goes into liquidation his landlord should be in a better or worse position than he would be in if he goes into bankruptcy; still one must say what the true interpretation of the Act is. It may be a *casus omissus*, and it may be that in 1875, when the Legislature passed a *Statute Law Revision Act*, they did put in *per incuriam* words which strike this case. But

on reflection, giving the best attention I can to it, I think the way in which the law works is that although the 11th section of 56 Geo. 3, c. 50, does not in so many terms include the case of the trustee of a liquidating debtor, nevertheless the effect of the subsequent Act of 1869 is to restrict the trustee of a liquidating debtor within exactly the same confines and limits as regards his rights as the trustee of a bankrupt. I do not think he gets any better or greater advantage with regard to property than the trustee of a bankrupt does, and I think, having regard to the two sub-sections which the Lord Justice has pointed to, sub-sect. 5 and sub-sect. 7 of sect. 125, though not precisely the language which would seem to have been invented for this particular case, yet, nevertheless, it would be running refinement to too great a length to suppose they could be construed in any other way except this, that the same rights as to property belong to the trustee of a liquidating debtor as to a trustee in bankruptcy, that what one takes the other takes, and that what the one cannot take the other cannot take.

FRY, L.J.:—

I am of the same opinion. The first question which I have stated to myself is this. Would the 11th section of 56 Geo. 3 affect a trustee in liquidation supposing no disclaimer had been executed? Now it appears to me that it would. It has been already pointed out that the language of that section refers only to assignees in bankruptcy, and directs that the assignees in bankruptcy shall not dispose of any hay and other materials of that description in any other manner than the bankrupt ought to have disposed of the same if no commission of bankruptcy had issued. Now it is plain that in the case of liquidation there is neither a bankruptcy nor a commission of bankruptcy. Nevertheless, I think that the section applies. In the first place, it appears to me not immaterial to observe that the 119th section of the statute of 1869 has substituted a trustee in bankruptcy for an assignee in bankruptcy in that Act, and substituted an adjudication in bankruptcy for a commission of bankruptcy, and has therefore made the Act of Geo. 3 to apply to a trustee in bankruptcy.

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Then the question is, whether the trustee in liquidation is in the same position as a trustee in bankruptcy. In the first place, the 5th sub-section of sect. 125 says, "all such property of the debtor as would, if he were made bankrupt, be divisible amongst his creditors shall . . . vest in such trustee." Now it is plain that if this had been a bankruptcy the property in question would not have been divisible amongst the creditors in any other manner than subject to the rights of the landlord under the statute of Geo. 3; it would not have been divisible at all if the covenant rendered it indivisible, and therefore all that would vest in the creditors would be that which would vest in the trustee in liquidation. The 7th sub-section appears to me to strengthen that contention. In the first place, the trustee under a liquidation is to perform the same duties as a trustee under a bankruptcy. It may be that the negative duty of not disposing of property in a manner inconsistent with the covenant is a duty which you observe and not perform, nevertheless the language seems to me to come so very near to enacting that all the duties which fall upon a trustee in bankruptcy are to fall upon a trustee under a liquidation that I am by no means sure that the other construction would not be too narrow. But then again, "the property of the debtor shall be distributed in the same manner as in bankruptcy." Now it appears to me that the effect of the Act of Geo. 3 has been to impose a fetter upon the distribution of a bankrupt's property, because whatever is necessary for the realization must be involved in the distribution, and it is plain to me that this fetter would apply in the case of liquidation. I think, therefore, that the property must be distributed and therefore realized subject to the fetter imposed by the statute of Geo. 3.

Then arises the second question, which is this. Does the 23rd section of the Act of 1869 when it is acted upon by a disclaimer put an end to the rights of the landlord conferred by the statute of Geo. 3? It appears to me that it is very possible that we ought to read the two sections as co-existing, especially bearing in mind that a few years after the passing of the Act of 1869, namely, in 1873, an Act was passed which repealed that portion of the statute of Geo. 3 which related to an assignee of an insolvent debtor's estate, and did not repeal that portion of it which

related to an assignee in bankruptcy. That in itself is strong evidence I think that the Legislature continued and intended to continue the statute of Geo. 3 still in force except as regards the assignee of an insolvent's estate. But it appears to me that the disclaimer does not interfere at all with that section, and for this reason—the section of the statute of Geo. 3 says that the matter shall be dealt with as if no commission of bankruptcy had issued, or—what is an analogue or substitute for that—that no petition in bankruptcy had been presented. In that case no disclaimer can be made, for the disclaimer is a thing dependent upon and subsequent to the proceedings in bankruptcy. If therefore you are to regard the rights as if no proceedings in bankruptcy were taken it follows that you must regard them as if no disclaimer had been made. I think, therefore, that the decision of the learned Judge was right, and that this appeal must be dismissed with the usual results.

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Solicitors: *Carr, Fulton, & Carr; Newton, Calcott, & Calcott.*

M. W.

BIDDER *v.* BRIDGES.

C. A. 1884 KAY, J. *Dec.* 13, 16, 17.

[1883 B. 4054.]

Practice—Discovery—Interrogatories—Discovery of Plaintiff's Evidence.

C. A. 1885 *Feb.* 4.

B. and *N.*, two landowners in the parish of *M.*, brought an action for a declaration that a piece of land formed part of *M. Common*, and to establish commonable rights thereover. *N.* sued as owner in fee of a beerhouse and three cottages, and the Plaintiffs pleaded the exercise of the rights claimed from time immemorial. The Defendant was the lord of an adjacent manor, and his defence was that the piece of land never formed part of *M. Common*, but was common land forming part of his own manor; that if the Plaintiffs ever had any rights of common thereon such rights had been extinguished; that some of the rights claimed could only be used in respect of ancient tenements, and that the beerhouse and three cottages in respect of which *N.* sued had no land held therewith. After the defence had been delivered the Defendant administered interrogatories to the Plaintiffs, asking in effect:—1. How long the Plaintiffs had been owners or occupiers of their properties, and for what estates, what was the tenure thereof, and whether those lands were within the limits of any and what actual or reputed manors, and whether any such premises were ancient messuages, and

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whether the beerhouse and three cottages had any and what lands appurtenant thereto or held therewith. 2ndly. Whether the Plaintiffs or their predecessors in title, as proprietors or occupiers of any lands in *M.*, or under any other alleged title, had exercised the rights claimed upon any and what parts of *M. Common*, or upon any and what part of the piece of land in question. 3rdly. The Plaintiffs were asked to set forth particulars of their exercise of such rights, and whether they did so by any license or in consideration of any and what payment. The Plaintiffs objected to answer these interrogatories on the ground that they related exclusively to their own title and to the evidence they should adduce at the hearing.

Upon a summons that the Plaintiffs might be ordered to make a sufficient answer :—

Held, by *Kay*, J., that the Plaintiff *N.* must answer so much of the first interrogatory as asked, whether the beerhouse and cottages had any lands appurtenant thereto or held therewith, because he had not pleaded that they had, and the Defendant had pleaded that they had not; but that the rest of the interrogatories need not be answered, because they were in effect directed to the discovery of the evidence by which the Plaintiffs intended to prove their case at the hearing.

Eade v. *Jacobs* (1) and *Hoffmann* v. *Postill* (2) explained.

Lowndes v. *Davies* (3) dissented from.

On appeal by the Defendant the question was left to the Judges of the Court of Appeal as arbitrators to settle what parts of the interrogatories should be answered, and the Plaintiffs were directed to answer further parts of them.

ADJOURNED SUMMONS.

This action was brought by *G. P. Bidder* and *W. H. Nightingale*, two owners of freehold lands and tenements in the parish or vill of *Mitcham*, in the county of *Surrey*, on behalf of themselves and all other the proprietors and occupiers of lands or tenements in such parish or vill, for a declaration that a certain piece of land called *Beddington Corner* formed part of *Mitcham Common*, and that the Plaintiffs and the persons on whose behalf they sued were entitled to stock the same with commonable beasts, and also to exercise rights of estover and recreation thereupon. The Plaintiffs also claimed an injunction to restrain the three Defendants from trespassing or building on such piece of land, or from interfering with the Plaintiffs in the enjoyment of their rights and privileges in respect thereof. By their statement of claim the Plaintiffs pleaded that the owners and occupiers of lands and tenements in the parish of *Mitcham* had from time to

(1) 3 Ex. D. 335. (2) Law Rep. 4 Ch. 673.
(3) 6 Sim. 468.

time immemorially as of right enjoyed rights of pasture and estovers, and other rights, over *Beddington Corner*; and in paragraphs 19 and 20 they pleaded that the Plaintiff *Bidder* was seised in fee for an estate of inheritance in possession of a freehold mansion-house known as "*Ravensbury*," with outbuildings and thirty-two acres of land held therewith, situate in the parish of *Mitcham*, and that the Plaintiff *Nightingale* was seised in fee for an estate of inheritance in possession of a freehold messuage or tenement used as a beerhouse, and known as the "*Fountain*," and of three freehold cottages lying near the said messuage, and that the Plaintiffs were respectively entitled in respect of their holdings to the aforesaid rights of pasture for their cattle, and estovers and other rights, and that the Defendants threatened to inclose a part of what the Plaintiffs claimed as a common.

The Defendants were the lord of an adjacent manor and two persons claiming under him; and the defence was that the piece of land in question never was included (as the Plaintiffs alleged) in *Mitcham Common*; that if the Plaintiffs ever had any such rights as they claimed thereon such rights had been extinguished; and as to the property in respect of which the Plaintiff *Nightingale* sued, the Defendants pleaded that the beerhouse and cottages had no land attached thereto or held therewith, and they did not admit that the messuages occupied by the Plaintiffs respectively were ancient messuages.

After the statements of claim and defence had been delivered, the Defendants administered the following, amongst other, interrogatories:—

1. How long have you, *George Parker Bidder* and *William Henry Nightingale*, been respectively proprietors or occupiers of the lands and premises respectively called "*Ravensbury*," the "*Fountain* beerhouse," and three cottages, and for what estates or interests, and what is the tenure thereof respectively? Are such respective premises, or were they, and any or which of them, at any time heretofore, and when last, held or within the limits of any and what actual or reputed manors or manor, or subject to any and what quit or chief rents or services, and to whom payable or rendered? Set forth which of the manors of *Ravensbury*, *Mitcham*, *Biggin*, and *Tamworth*, or *Vauxhall*, extend as you

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allege over any and what parts or part of the land described in your statement of claim as *Beddington Corner*, and which is in fact *Wallington Common*, but is hereinafter referred to as *Beddington Corner*. Are any, and which of the messuages held by you respectively ancient messuages, or how otherwise, and when were the same respectively built? Have the said *Fountain* and three cottages respectively any and what lands appurtenant thereto or held therewith?

2. Have you *George Parker Bidder* and *William Henry Nightingale*, respectively, or your respective predecessors in title as proprietors or occupiers of any and what lands or tenements in the parish of *Mitcham*, or under any other alleged title, or in any other capacity ever, either kept, placed, or depastured any and what kind of commonable beasts, or any other and what animals in or upon, or cut or taken furze or gorse upon or from, or dug or taken gravel, sand, or other materials upon or from, or taken part in any and what games or sports in or upon either any and what parts or part in particular of *Mitcham Common* (but not including *Beddington Corner* therein), or in or upon any and what part or parts in particular of *Beddington Corner* respectively?

3. If yea, set forth when and for how long, and whether or not continuously, or at some and what intervals, and when first and when last, and where and under what alleged title you or your predecessors in title respectively so depastured animals or took any furze or gorse, gravel, sand, or other materials, or took part in games or sports, and whether you or they respectively so depastured animals or took away gorse, furze, gravel, sand or other materials without limit or subject to any and what limit, or did so by any and what license, or in consideration of any and what payment, or otherwise, and how and for what purposes you or they respectively applied such gorse, furze, or other materials.

The Plaintiffs objected to answer these interrogatories upon the ground that they related exclusively to their own title, and did not tend to support the Defendants' case, and that the particulars demanded formed part of the evidence they should adduce at the hearing.

The Defendants then took out a summons that the Plaintiffs might be directed to make a full and sufficient affidavit in answer to these interrogatories, and this summons was adjourned into Court, and came on for hearing before Mr. Justice *Kay* on the 13th of December 1884.

Hastings, Q.C., and *Kingdon*, for the Defendants in support of the summons:—

The interrogatories may be divided into four classes: viz., 1. Are the messuages in respect whereof these commonable rights are claimed by the Plaintiffs ancient messuages? 2. Are there any lands held by the Plaintiff *Nightingale* together with the *Fountain* beerhouse and the three cottages? 3. Are the Plaintiffs' tenements held of any and what manor? 4. Has there been any user by the Plaintiffs or their predecessors in title of their alleged rights over the common?

As to No. 2 the Plaintiffs have not pleaded that any lands are or ever were so held; we have pleaded that none ever were: here is a direct issue, and we are clearly entitled to discovery and to obtain admissions from them on this point. As to the other interrogatories, although the Defendants are not entitled to ask by what evidence the Plaintiffs intend to prove their case, they are entitled to discovery, not only of the facts upon which the Plaintiffs rely to establish their case: *Eade* v. *Jacobs* (1); *Attorney-General* v. *Gaskill* (2); but also, subject to the question of privilege, as to any facts within the knowledge of the Plaintiffs which go to rebut the case which the Plaintiffs set up against them: *Lowndes* v. *Davies* (3); *Hoffmann* v. *Postill* (4).

Having regard to the nature of the action the matters interrogated upon cannot "relate exclusively" to the Plaintiffs' case, and therefore the Plaintiffs are not entitled to decline to answer on that account: *Lyell* v. *Kennedy* (5); *Storey* v. *Lord Lennox* (6).

[KAY, J., referred to *Wigram* on Discovery (7), *Ivy* v. *Kekewick* (8), and *Bray* on Discovery.]

(1) 3 Ex. D. 335.
(2) 20 Ch. D. 519.
(3) 6 Sim. 468.
(4) Law Rep. 4 Ch. 673.
(5) 8 App. Cas. 217, 224, 227; S. C. 9 App. Cas. 81, 85; 27 Ch. D. 1.
(6) 1 Keen, 341.
(7) Page 15.
(8) 2 Ves. 679.

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Kekewich, Q.C., and *P. H. Lawrence*, for the Plaintiffs:—

We admit that we must answer such part of interrogatory No. 1 as asks whether the *Fountain* and three cottages had any and what lands appurtenant thereto or held therewith.

[They were then stopped by the Court.]

KAY, J.:—

This case raises what seems to me an extremely important question as to the right which a defendant has to exact from the plaintiff discovery by means of interrogatories.

The rule laid down in a book which has always been considered (and I will give in a moment the reason why I say so) of the highest authority on this subject, the late Vice-Chancellor *Wigram's* book on Discovery, is this, I will read from page 15 what is material to this case: "Proposition 2. It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit." Then proposition 3 is this: "The right of a plaintiff in equity to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the '*plaintiff's case*,' and does not extend to a discovery of the manner in which the '*defendant's case*' is to be exclusively established"—that is one thing—"or to evidence which relates exclusively to his case." There are therefore two things which a plaintiff may not require discovery of from the defendant. One is the manner in which the defendant's case is to be exclusively established, and the other is the evidence which relates exclusively to that case. Now I turn to page 288 of the same book, and there, after a very careful examination of a good many authorities, it is stated in placitum 375: "The preceding cases must establish, if authority can establish, the original privilege of a defendant to withhold discovery appertaining to his own case alone; and the absence of all original right in a plaintiff to call for such discovery. And from those cases it will be seen that the privilege of the defendant is the same, whether he is defendant in an original suit in which relief is sought, or is

plaintiff in that suit and is made defendant to a cross bill, for the purpose of discovery." Then in a note are a number of cases which are referred to in the preceding placita, which I have myself examined, and which seem entirely to support that statement.

I said that the authority of that book stands as high at this day as it ever did, and I have the best possible warrant for so saying, because in *Lyell* v. *Kennedy* (1), in the House of Lords, Lord *Selborne* says (2): "It was held (I think correctly) that the right of discovery under the present rules of the Supreme Court is not in principle more extensive than it formerly was in the Court of Chancery." Then (3) he cites the two propositions which I have just read from Vice-Chancellor *Wigram's* book, referring to them as the two cardinal rules on the law of discovery, and to that book, as being a book of the highest authority upon these questions of practice in equity. Therefore I must take the rule to be the same in the case of a defendant seeking discovery now as it would have been in the case of a defendant seeking discovery by a cross bill under the former practice in equity. No more, no less. And that rule is in the words which I have read from the book of Sir *James Wigram*.

Now, it is objected to that, that there are certain cases which establish a difference. I will presently refer to the mode in which *Wigram*, V.-C., establishes these propositions, and to certain authorities which he cites, and which seem to me very much in point in this present case. It is quite plain according to this rule that if a defendant met the case of a plaintiff, who was seeking to establish some title, whether to land or anything else, by a mere direct negative, that would not have entitled the defendant under the old practice to file a cross bill and then by means of interrogatories in that cross bill to discover how the plaintiff's case was to be exclusively established, or to discover the evidence which related exclusively to his case; and it cannot be said that because the defendant meets the plaintiff's case with a direct negative, that therefore the evidence which the plaintiff will adduce in support of his own case relates also to the defendant's

(1) 8 App. Cas. 217. (2) 8 App. Cas. 223.
(3) 8 App. Cas. 224, 225.

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case in such sense as to entitle the defendant who only pleads a direct negative to examine that evidence.

Now to go at once to the cases from which *dicta* are cited which are supposed to contravene that rule, I will take the case of *Eade* v. *Jacobs* (1). In that case, the plaintiffs, as administrators of *Isaac Eade*, sought to recover possession of certain hereditaments of which the defendant was lessee for breach of a covenant contained in the lease. Pausing there, the affirmative case would be to prove that he had committed breaches of covenant. One of the breaches relied on was, "that the defendant had during the term made certain alterations in, and additions to, the demised hereditaments without the consent in writing of the intestate or of the plaintiffs as his administrators. The defendant pleaded that the alterations and additions were made with the consent and authority of the intestate." Suppose that case came to trial, the case of the plaintiff is, "you have committed a breach of covenant;" the defendant confesses and avoids. He says: "There would have been a breach of covenant but for this—that I obtained the consent of the lessor." That is not the plaintiff's case. It was the defendant's case, and the plaintiff interrogated at what date or dates were the alterations made, when did the lessor consent to or authorize the alterations and additions and required the defendant to state "when and in whose presence such consent and authority was given," and to state fully the conversations when such consents were given. Those were interrogatories by the plaintiff. Clearly that was a case within the rule. It would be *primâ facie* a case where the plaintiff was asking the defendant how he made out his own case. But it is quite plain, when you read the judgment, on what ground the defendant was made to answer to the extent to which discovery was ordered; Lord Justice *Cotton*, after saying the interrogatories had gone too far, continues (2): "Looking at the practice formerly existing in the Court of Chancery, I think that the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce." Then his Lordship, after saying that the words, "In whose presence" are to be struck out

(1) 3 Ex. D. 335. (2) 3 Ex. D. 337.

because that would tend to shew what evidence the defendant was going to produce, deals with the matter thus: "Then comes the question as to conversations. The old rule of pleading in Chancery was that conversations when relied upon as admissions must be stated in substance and effect; and this was a wholesome rule to be followed, because it prevented the opposite party from being taken by surprise." Nobody would object to that for a moment. The ground on which the judgment goes is, "your pleading is defective; you have not set out with sufficient particularity these conversations on which you rely; you must give in short further and better particulars." That is the whole gist, as I understand it, of the judgment of the Court. If this had been properly pleaded there would have been no room for an interrogatory; but, because it was not stated with sufficient particularity, the rule of the Queen's Bench Division entitling a party to further and better particulars in the case of defective pleadings applied, and the discovery, limited in the way I have pointed out, was allowed. That is a matter which stands on a principle entirely by itself and has nothing to do with the case now argued. But out of that judgment is picked this *dictum*: "I think the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce." With great deference, if that is meant as a general proposition, which I am quite satisfied it is not, I should entirely disagree with it. It seems to me that to ask a plaintiff who has properly pleaded his case, upon what facts he relies to make it out, is only another way of asking what is his evidence. If any authority were wanted for that it seems to me that the decisions are as clear as can be. I will take one case of considerable antiquity, decided in 1795, *Ivy* v. *Kekewick* (1). There "the bill stated that the testator had, after the execution of his will, contracted for the purchase of an estate; which purchase was completed by his executor *Kekewick*, who conveyed to his son; and that they are, or one of them is, in possession; that the plaintiff is heir *ex parte maternâ*, and that there is no heir *ex parte paternâ*. The defendant *Kekewick*, by his answer, claimed as heir *ex parte paternâ*. The plaintiff,

(1) 2 Ves. 679.

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by the amended bill, prayed, that the defendant might set forth" (and, observe, this was asking the defendant not as to the evidence, but as to the facts on which he relied to make out that he was heir *ex parte paternâ*) "in what manner he is heir *ex parte paternâ*, and all the particulars of the pedigree, and the times and places, or particulars of the births, baptisms, marriages, deaths or burials of all the persons who shall be therein named." There was not a word asked as to the evidence by which or the manner in which these things were to be established, but what was asked was as to the facts of the pedigree, and the Lord Chancellor said: "This is a fishing bill to know how a man makes out his title as heir. He is to make it out; but he has no business to tell the plaintiff how he is to make it out. Allow the demurrer." There are plenty of other cases which seem to me entirely consistent with that. Take, for instance, *Ingilby* v. *Shafto* (1). There the Master of the Rolls first gave his opinion offhand, and then in a considered judgment repeated the opinion he had before expressed, and he said (2), with reference to the plaintiff in a bill of discovery, "He is entitled to the discovery of everything in the possession of the other party, either of facts, deeds, papers or documents, which will help him in making out his case at law; it is confined to that, and he cannot go beyond that. No doubt in cases praying relief you may do this:—you may ask what defence do you make to my case, and on what ground. But that is because the Court requires the case of each party to the suit to be pleaded, in order that neither may be taken by surprise;" and then he refers to Sir *James Wigram's* book, and the observations at page 286 and the following pages.

The same learned Judge in *Commissioners of Sewers of the City of London* v. *Glasse* (3) (which comes very near to this in point of fact) decided that a defendant who filed interrogatories for the examination of a plaintiff was not entitled to this amount of discovery. That was a suit on behalf of the owners and occupiers of lands or tenements lying within the *Forest of Essex*, the object of which was to establish in favour of the parties represented by the plaintiff as against the defendants (who were the

(1) 33 Beav. 31.
(2) 33 Beav. 42.
(3) Law Rep. 15 Eq. 302.

lords of divers manors within the forest, and certain persons who had inclosed pieces of waste lands within the forest) certain rights of common over the whole of the waste land within the forest. One of the defendants, the lord of the manor of *Chigwell*, alleged that the rights of common over the wastes of his manor had been enjoyed by the tenants thereof only, and denied that the occupiers of lands within the forest but not within the manor had ever enjoyed any rights of common over the wastes of the manor, and he filed interrogatories for the examination of the plaintiffs, and thereby interrogated as follows:—"Is it not the fact that no owners or occupiers of land within the said forest but not within the said manor" (of *Chigwell*) "have ever enjoyed any right of common of pasture over the waste lands of the said manor?" That was clearly a question in support of his own case. Then he went on: "If the plaintiffs allege that they have, let them set forth any instance in which such rights have been enjoyed, and by whom, and when, and in respect of what land, and where such land was situated, and in respect of what cattle or other animals." Again I observe there is not a single question about the evidence, such as "by whom are you going to prove these things," or "by what evidence are you going to prove these things," but the question is as to the fact. "Set forth any instance in which those rights have been enjoyed?" The answer was a traverse of the general proposition. "It is not the fact that no owners or occupiers of land within the said forest but not within the said manor have ever enjoyed any right of common of pasture over the waste lands of the said manor, but, on the contrary, we allege that such owners and occupiers have enjoyed such right." Observe that is what the plaintiffs were bound to plead in answer to the defendants' pleadings, and then they decline to give any answer to the rest of the interrogatory. Lord *Romilly* said (1): "The party interrogating (whether plaintiff or defendant) was always entitled to discovery of everything which made out his own case, or which shewed that he was in the right, but not to discovery of matters which supported his opponent's case or shewed that his opponent was in the right. If, for example, this defendant had alleged that there were cases in which the right set up by the plaintiffs had been

(1) Law Rep. 15 Eq. 304.

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claimed and successfully resisted, and had interrogated the plaintiffs as to such cases, he would have been entitled to an answer; but the interrogatories simply required the plaintiffs to disclose the evidence in support of their case." That is in one sense perfectly accurate. He did not ask, how are you going to prove the facts? But the facts of which he asked an admission were of no moment or purport in the case at all except as evidence by which the plaintiffs were to make out their own case, and he refused to allow them to be answered. It seems that there was an argument on one side only in that case, and the counsel who contended that the interrogatories were not properly answered, submitted that there was a difference between the case of a plaintiff answering a defendant's interrogatory, and a defendant answering a plaintiff's interrogatory (a proposition I have already dealt with in referring to Vice-Chancellor *Wigram's* book), and in support of that contention they referred to two cases of *Hoffmann* v. *Postill* (1) and *Lowndes* v. *Davies* (2). As to *Lowndes* v. *Davies*, I will only say this, that it is a case which is discussed in Vice-Chancellor *Wigram's* book (3), where he points out that it stands really alone, and is not consistent with the previous authorities he refers to; and elsewhere in the book he refers to the fact that Vice-Chancellor *Shadwell* had shewn in many cases a determination as far as he could to assist discovery in almost every case. But he also refers to another case which came before the same learned Judge when he was a Lord Commissioner, namely, *Hardman* v. *Ellames* (4), in which the decision seems to have been not entirely consistent with that in *Lowndes* v. *Davies*. However, he disputes the authority of *Lowndes* v. *Davies*, and I cannot find any case in which that has been followed unless it be in *Hoffmann* v. *Postill*. That is a case which, to my mind, as far as the decision goes, is very clear and simple. There the bill had been filed by the owners of a patent against the defendant for infringement, and the defendant, having answered the bill, filed a concise statement and interrogatories for the examination of the plaintiff. In his answer he had set up that the patent was void for want of novelty. Everybody familiar with patent cases knows that that is an issue

(1) Law Rep. 4 Ch. 673.
(2) 6 Sim. 468.
(3) Page 289.
(4) 2 My. & K. 732, 755.

the affirmative of which is on the defendant. He has a perfect right to interrogate as to the want of novelty to any extent he likes, because that is his case, and not the plaintiff's case, and accordingly Lord Justice *Selwyn* and Lord Justice *Giffard* thought that interrogatories which went to that part of the case ought to be answered. And Lord Justice *Giffard* is reported to have said (1): "As regards the case of *Daw* v. *Eley* (2), it must be always remembered that that was the case of a plaintiff exhibiting interrogatories to a defendant, and it was there held that the plaintiff could not call on the defendant to set forth the particulars of his defence. But when you come to the case of a defendant asking questions of a plaintiff, it is a very different thing. It is the defendant's business to destroy the plaintiff's case, and there the defendant has a right to ask all questions which are fairly calculated to shew that the patent is not a good patent, or that what he alleges to be an infringement, is not an infringement." As to the first branch of that proposition, there could not be, for the reason I have given, the least doubt. It was not the plaintiff's case but the defendant's case that the patent is void for want of novelty. The defendant had a perfect right to search the conscience of the plaintiff, and to make that out if he could from the admissions of the plaintiff. But if this is to be understood as stating a general proposition that in every case whatever a defendant who does not set up any substantial case of his own, but merely meets the case of the plaintiff by a traverse, is entitled, to use these words, to destroy the plaintiff's case, and to ask all the questions he possibly can to effect that purpose, that is simply a contradiction of the well-settled rule that the questions which either plaintiff or defendant can ask must be confined to those which establish his own substantive case, and do not embrace questions relating to the evidence by which or the manner in which his adversary means to establish his case. I am quite satisfied that so great a Judge as Lord Justice *Giffard* never intended in those words, which seem to have been cited in subsequent cases (for instance, in *Commissioners of Sewers of the City of London* v. *Glasse* (3)), to lay down the proposition that a defendant has a

(1) Law Rep. 4 Ch. 681. (2) 2 H. & M. 725.
(3) Law Rep. 15 Eq. 302.

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larger right of discovery than a plaintiff. I feel satisfied that he was only dealing with the case before him.

The only other case to which I need refer is *Attorney-General* v. *Gaskill* (1), a decision of Vice-Chancellor *Bacon's* which went before the Court of Appeal. In that case an action was brought by the Attorney-General and a local board to restrain the defendant from building across a public footpath. The defendant denied the existence of any public right of way over the ground. The plaintiffs delivered interrogatories as to the existence of a public right of way and as to what passed at a conversation at a certain board meeting, and at a conversation between the defendant and plaintiff's solicitor before that meeting. The defendant declined to answer those interrogatories, alleging that as to the right of way he was not bound to answer as to a right which he had denied by his pleadings; and the Court of Appeal held that that was precisely within the rule as to discovery. The plaintiffs were seeking to search the conscience of the defendant, not as to the defendant's case but as to their own case. They said there was a right of way, and they were interrogating the defendant to try and obtain from him admissions that such was the case. That is strictly within the rule as I have read it, and I notice that, like Lord *Selborne* in the House of Lords in *Lyell* v. *Kennedy* (2), the late Master of the Rolls here observes (3) that there had been "some misapprehension as to the effect of the Judicature Acts. They do not alter the rules as to discovery, except so far as there are express rules on the subject." And Lord Justice *Cotton*, with reference to his own judgment in *Eade* v. *Jacobs* (4), says (5), "I think it has been somewhat misunderstood. In that case the defence had set up a parol agreement which was said to be material, and what I held was this, that the interrogatories ought to some extent to be limited, so as to ask the defendant to give discovery of the substance only of the conversation on which he relied as a defence, and that the person interrogated was not bound to set forth the names of the witnesses or the details of the conversations. That was expressed in this

(1) 20 Ch. D. 519.
(2) 8 App. Cas. 217.
(3) 20 Ch. D. 526.
(4) 3 Ex. D. 335.
(5) 20 Ch. D. 529.

passage of the judgment, 'I think that the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce,' and the rest of the judgment, modifying in some slight way the interrogatory, has reference to what I laid down as the principle of the decision." I think that what the learned Judge decided was only this. The defendant has not pleaded these conversations as strictly as according to practice in Chancery he ought to have done, and therefore he is bound to answer this interrogatory to the extent to which it seeks that statement from you which ought to be contained in your pleadings. Now I turn to the case before me.

[His Lordship then stated the nature of the case, and continued:—] The Plaintiffs' case is met by a defence which practically amounts to a general traverse; but with respect to the property claimed by *Nightingale* there is a substantive case set up by the defence that the beerhouse and cottages in *Nightingale's* possession have not any land attached thereto or held therewith. As to that, the Plaintiff has not pleaded that there was any land attached thereto, and I think that that is a matter as to which an answer should be given. Then they say in the defence that the right could only be enjoyed in respect of ancient tenements, and they do not admit that the Plaintiffs' alleged tenements are ancient. The interrogatories, which have been very usefully classified by Mr. *Hastings*, ask, in effect, four questions. First, are the messuages of which the Plaintiffs are in possession ancient messuages? secondly, are there any lands held with the beerhouse and cottages? thirdly, are the tenements in question held of any manor? and, fourthly, has there been any user by the Plaintiffs or their predecessors in title of those alleged rights over the common?

I omit the second, as to which I have said there ought to be an answer, but the first, third, and fourth are all matters which the Plaintiffs may, and probably will, have to prove in order to support their case. The interrogatories do not ask "by what evidence are you going to prove these facts?" but they ask, "are these things the fact or not?" The materiality of these questions to the Defendants' case is this, that if they can make out that they

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are not the fact they will be able to defeat the Plaintiffs' case; that is to say, if they can shew from their admissions that they cannot prove these facts as to which they are interrogated, then they will not be able to make out their case. But is that legitimate? It is directly against the rule which I have been citing from Vice-Chancellor *Wigram's* book. It is not asking discovery in respect of any substantive case of the Defendants, but it is asking discovery from the Plaintiffs as to the facts on which they must rely to make out their own case; and that, according to the rule laid down in all the cases which I have referred to, is clearly beyond the limit to which a man can go. It is like looking into the brief of the other side. It is like asking, "Now tell me what are you going to prove at the hearing; I am not asking for your evidence, but I will ask what you are going to prove." Take, for example, the case of user. User or non-user has no materiality in this action at all, except as a mode by which the Plaintiffs will attempt to make out the right they assert.

Suppose the question had been in this form. Have you any, and what, evidence to prove acts of user? It is obvious that no such question as that could be asked. Then leave out the words, "and what," and let the question run thus:—Have you any evidence to prove acts of user? Could that question be put? To my mind clearly not. They have clearly no right to know whether he has the evidence any more than to know what the evidence is. Then alter the form of the question again: "Have you or your predecessors in title ever used?" that is only another way of asking what the evidence is, and I refer to *Ivy* v. *Kekewick* (1), as shewing that that is precisely what cannot be asked. You have no right to know how your adversary will make out his case; of course you cannot ask how it is going to be proved, but further, you cannot ask as to the facts by which he will prove his case. It will not do to come here and say, "Now I will not ask you by what evidence you can prove the fact, but I will ask you is it a fact or not; that is, can you prove it or not?" I do not want to rest my decision in this case on a particular part or word of the interrogatory. It has been very fairly indeed put as a question of principle.

(1) 2 Ves. 679.

The next interrogatory is—are these tenements held of any manor? That again is part of the Plaintiffs' evidence which before the trial the Defendants have no right to demand from the Plaintiffs. Then the remaining question is, "Are these messuages ancient messuages?" That, too, is a part of the Plaintiffs' case. None of these questions are questions as to any substantive case set up by the Defendants by way of confession and avoidance of the Plaintiffs' case, and they are not relevant to the Defendants' case, except as a direct negative of the Plaintiffs' case. Therefore they are questions seeking to find out what will be in the Plaintiffs' brief at the trial, what sort of evidence he is going to produce; how he is going to make out his case in point of proof, and for that reason it seems to me they are altogether wrong, and I must disallow the summons, except as to the question with reference to the beerhouse and cottages, which Mr. *Kekewich* admits must be answered.

The costs will be distributed, the Plaintiffs paying the costs of the summons so far as it relates to the interrogatories, which they have to answer, and the Defendants paying the rest; and there must be a set-off.

W. W. K.

C. A.

The Defendant *Bridges* appealed, and the appeal was heard on the 4th of February, 1885.

Hastings, Q.C., and *Kingdon*, for the Appellant, referred to *Lyell* v. *Kennedy* (1); *Earl De la Warr* v. *Miles* (2); *Flight* v. *Robinson* (3); *Grumbrecht* v. *Parry* (4); *Hoffmann* v. *Postill* (5); *Eade* v. *Jacobs* (6); *Wigram* on Discovery (7); *Attorney-General* v. *Gaskill* (8); *Commissioners of Sewers of the City of London* v. *Glasse* (9); *Saunders* v. *Jones* (10).

Kekewich, Q.C., and *P. H. Lawrence*, for the Plaintiffs.

Before the argument for the Respondents was concluded, the

(1) 9 App. Cas. 81.
(2) 17 Ch. D. 535, 593.
(3) 8 Beav. 22.
(4) 32 W. R. 203, 558.
(5) Law Rep. 4 Ch. 673.
(6) 3 Ex. D. 335.
(7) Page 66.
(8) 20 Ch. D. 519, 526.
(9) Law Rep. 15 Eq. 302.
(10) 7 Ch. D. 435.

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Court intimated an opinion that the Plaintiffs were bound to answer some further part of the interrogatories, and suggested an arrangement between the counsel as to what parts should be answered. Ultimately it was agreed that the Court (*Baggallay*, *Bowen*, and *Fry*, L.JJ.) should, as arbitrators, settle the interrogatories in the form in which they were to be answered. This their Lordships proceeded to do.

BAGGALLAY, L.J.:—

Counsel in this case have, I think, with very great discretion, and certainly to our great relief, placed the Court in the position of arbitrators, and we have endeavoured in what we have done to bear in mind what are our views of the several authorities which have been cited to us. We think that the interrogatories were too wide, but on the other hand we think that some of them ought to be answered, and we think that they should assume the form I am about to mention. I may add also that, having regard to the modifications which have been made, that in this case we think the costs here and below should be costs in the action. The interrogatories as altered will stand as follows:—

[His Lordship then read the interrogatories which were altered as shewn below, the words which the Court inserted being inclosed in square brackets, and the parts struck out being printed in italics.]

1. How long have you George Parker Bidder and William Henry Nightingale been respectively proprietors or occupiers of the lands and premises respectively called in your statement of claim Ravensbury, the Fountain beerhouse, and the three cottages, and for what estates or interests, and what is the tenure thereof respectively? Are such respective premises, or were they or any and which of them at [any time] heretofore, and when last, held [of] or [situate] within the limits of any and what actual or reputed manors or manor, *or subject to any and what quit or chief rents or services, and to whom payable or rendered*? Set forth which of the manors of Mitcham, Ravensbury, Biggin, and Tamworth or Vauxhall extend, as you allege, over any and what parts or part of the land described in your statement of claim as Beddington Corner, and which is in fact Wallington Common, but is herein-

after referred to as Beddington Corner. Are any and which of the messuages held by you respectively ancient messuages, or how otherwise, and when were the same respectively built? Have the said Fountain and three cottages respectively any and what lands appurtenant thereto and held therewith?

2. Have you, George Parker Bidder and William Henry Nightingale respectively, *or your respective predecessors in title*, as proprietors or occupiers of any and what lands or tenements in the parish of Mitcham, *or under any other alleged title or in any other capacity*, ever placed, kept or depastured any and what kind of commonable beasts, or any other and what animals, in or upon, or cut or taken furze or gorse upon or from, or dug or taken gravel, sand, or other materials upon or from, or taken part in any and what games or sports in or upon, either any and what parts or part in particular of Mitcham Common (but not including Beddington Corner therein), or in or upon any and what part or parts in particular of Beddington Corner respectively?

3. If yea, set forth [the instances with dates and whether the same were] *when and for how long and whether or not continuously or at some and what intervals, and when first and when last, and when and under what alleged title, you or your predecessors in title respectively so depastured animals, or took away furze or gorse, gravel, sand, or other materials, or took part in games or sports, and whether you or they respectively so depastured animals or took away gorse, furze, gravel, sand, or other materials without limit, or subject to any and what limit, or did so* by any and what license, or in consideration of any and what payment, *or otherwise*, and how and for what purposes you or they respectively applied [any] such gorse, furze or other materials.

Solicitors for Plaintiffs: *Rooke & Sons.*

Solicitors for Defendants: *Bridges, Sawtell, Heywood, Ram, & Dibdin.*

H. C. J.

C. A.
1885
Feb. 18.

WASHBURN AND MOEN MANUFACTURING COMPANY *v.* PATTERSON.

[1883 W. 807.]

Practice—Security for Costs—Dismissal of Appeal for want of Security.

Where an order has been made for the Appellant to give security for the costs of an appeal, if he does not give it within a reasonable time, the Court will dismiss the appeal without giving further time, unless there are extenuating circumstances.

As a general rule a period of three months is more than a reasonable time.

THIS was an action for infringement of certain patents belonging to the Plaintiff company, and judgment was given in their favour on the 23rd of June, 1884. The Defendant gave notice of appeal. The Plaintiffs moved for security for costs, and on the 5th of November, 1884, an order was made for the Defendant to find security in the sum of £200, or pay that sum into Court, and for the proceedings in the appeal to be stayed until such security was given or money paid into Court.

The Defendant not having done anything in compliance with this order, the Plaintiffs moved on the 18th of February, 1885, that the appeal might be dismissed for want of prosecution. The Defendant did not file any affidavit explaining his non-compliance with the order.

Webster, Q.C., and *Bousfield*, for the motion, asked that the appeal might be dismissed at once without giving further time.

The Appellant did not appear.

BAGGALLAY, L.J.:—

Some years ago the practice was to dismiss the appeal at once where a reasonable time for giving security had been exceeded without security being given. The more recent practice has been to allow the appellant a further limited time within which to give security, and to order that, if he does not give it within that time,

the appeal shall be dismissed without any further application to the Court. There is this disadvantage in the recent practice, that it encourages the appellant to wait until an application to dismiss the appeal is made. We will consult the other Judges of the Court of Appeal as to the rule which it is best to establish.

FRY, L.J., accordingly went to consult the other Judges of the Court of Appeal, and on his return judgment was given.

BAGGALLAY, L.J.:—

It is the opinion of the Judges in the other Court of Appeal, as it is our own, that it will be best to return to the old practice of making an immediate order for the dismissal of an appeal, where the appellant has not within a reasonable time given security, and there are no extenuating circumstances. We think that in general three months must be considered more than a reasonable time. Therefore in future, when three months, or what the Court may consider a reasonable time, have elapsed without security being given, an order will be made for immediate dismissal of the appeal, unless there are extenuating circumstances, in which case the Court will take those circumstances into consideration, and if they are sufficient will fix a further time. We do not lay it down as a rule that less than three months will in no case be sufficient, but only that an unexplained delay of three months is sufficient. In the present case, as the delay is not explained, the order will be that the appeal be dismissed.

BOWEN and FRY, L.JJ., concurred.

Solicitors: *Radford & Frankland.*

H. C. J.

C. A.
1885
PEARSON, J.
Feb. 6.
C. A.
Feb. 18.

GARDNER *v.* JAY.

[1883 G. 1970.]

Practice—Trial by Jury—Action assigned to Chancery Division—Joinder of Cause of Action not so assigned—Rules of Supreme Court, 1883, *Order* XXXVI., *rr.* 3, 6.

The Plaintiff commenced an action in the Chancery Division alleging that the Defendant was trustee of a sum of £700 for her, and claiming payment of that sum with interest, and, if necessary, an account of profits made by the Defendant by using it in his business, and also claiming the return of certain chattels, or their value, and damages for their detention. The Defendant denied the trust, stated that the money had been lent to him by the Plaintiff, and long ago repaid, and denied that he ever had any chattels of the Plaintiff in his possession. The Plaintiff, after the defence had been put in, applied to have the issues of fact tried by a jury:—

Held, by *Pearson*, J., and by the Court of Appeal, that the action came within Order XXXVI., rule 3, and not within rule 6 of the same Order. That the action therefore was to be tried by a judge without a jury, unless it could be made out that it was better to have it tried by jury, and that in the present case this was not shewn.

THIS was an action commenced in the Chancery Division by Mrs. *Gardner*, against her father, *W. C. Jay*. The Plaintiff alleged by her statement of claim, that in 1872 she gave the Defendant a sum of £700 upon an agreement that he would stand possessed of it in trust for her, that he still kept it, that he had employed it in his business, and refused to pay it to her, or to render her any account. She further alleged that the Defendant had retained certain goods and chattels belonging to her. She asked for a declaration that the £700 was received and had since been held by the Defendant as trustee for her, and that he was liable to account for and to pay that sum to her, with interest at £5 per annum; that all necessary accounts and inquiries might be taken and made, and, if necessary, an account of the profits made by the Defendant by the use of the £700 in his business, and payment of the money shewn to be due by such accounts. As to the goods and chattels, she claimed the return of them or their value, and damages for their detention.

The Defendant by his statement of defence denied that he had

ever received the sum of £700 as trustee for the Plaintiff. He stated that he had borrowed that sum from her in 1872, and had long since repaid it. He denied that he had ever had in his possession any goods and chattels of the Plaintiff.

The Plaintiff took out a summons to have the issues of fact tried by a jury. The summons was adjourned into Court, and was heard by Mr. Justice *Pearson* on the 6th of February, 1885.

Higgins, Q.C., and *Beddall*, for the Plaintiff:—

This action being a mixed action, partly Chancery and partly Common Law, does not come within rule 3, but within rule 6 of Order XXXVI., and is one which the Plaintiff had a right to have tried by jury; if it is not within rule 6, it is certainly not within rule 3, and is a *casus omissus* from the rules. There are simple issues of fact, both as to the existence of a trust and the detention of goods, proper for a jury to decide. The Court can send those issues to be tried by jury: *Cardinall* v. *Cardinall* (1); *Philips* v. *Beale* (2); *Cannot* v. *Morgan* (3).

Speed (*Cookson*, Q.C., with him), for the Defendant:—

The question as to whether there was a trust is a question for this Division, and as a matter of convenience the action will not be split up.

Higgins, in reply.

PEARSON, J.:—

The action, so far as it relates to the £700, is a proceeding which is pre-eminently one of those with which the old Court of Chancery had to deal, and with which the Chancery Division now deals, and requires the taking of accounts, with which the Queen's Bench Division never does deal, and has no machinery for dealing with.

The Plaintiff was so well advised that the action was one which came under the 34th section of the Judicature Act, and must be assigned under the section to the Chancery Division, that she issued her writ in this Division. She then joined on with it her

(1) 25 Ch. D. 772. (2) 26 Ch. D. 621.
(3) 1 Ch. D. 1.

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second cause of action, which is plainly and simply an action of detinue.

Now, she asks me to send this cause for trial by a jury, or at all events, to send issues of fact to be tried by a jury. With regard to the issues of fact, on the first branch of the case the simple question is whether or not £700 was given by the Plaintiff to the Defendant to hold as trustee for her. That really is the issue in the cause. That seems to me to be a case which can be tried properly here, and if it had stood alone, there could not have been the slightest reason for sending it to the Queen's Bench Division to be tried by a jury. It is a very simple issue of fact with which the Court is in the habit of dealing constantly, and I see no reason why I should send a case of that kind to be tried by a jury. I think it could be much better tried by a judge without a jury.

With regard to the second case, the question arises under the Rules whether or not this comes at all under the 6th rule of Order XXXVI. The 3rd rule deals with cases which are assigned by the *Judicature Act* to the Chancery Division. The 6th rule says that "in any other cause or matter," that is a cause or matter not assigned to the Chancery Division, any party to the cause is entitled to have any issue of fact tried by a jury. When you have two causes of action combined in the same pleadings, one of which is assigned to the Chancery Division and the other of which is not, does that make it a cause which comes under the 6th rule? I am of opinion that it does not. I think that if the Plaintiff has chosen to treat her action as an action assigned to the Chancery Division, and has properly treated it so with regard to the form of the relief which is claimed in the action, I am not at liberty to turn that action into two separate actions and to deal with it as if it were two separate actions.

There is no difficulty and no chance of injustice being done in that way, because under the 3rd rule, if I am to treat it as a cause assigned to the Chancery Division, which the Plaintiff has no right to send for any particular matter in it to a jury, nevertheless if at the trial of the action, or at any other stage of the action, it appears to the Judge who heard it that it is a case which ought to be submitted to a jury, or that any part of it

ought to be submitted to a jury, the Judge has full power of getting the benefit of a jury to decide so much of the cause as requires the assistance of a jury. I have no hesitation in saying, that as far as regards the convenience of this Court, I should be exceedingly willing to send the second part of this action to a jury, but I am told that it is short; I am told that it depends on a single point. I know not whether that is so or not. If I have to try the action hereafter, at the trial I shall be able to deal with it according as I find it, simple or complicated, requiring or not requiring the verdict of a jury. The reason why at the present moment I decline to exercise any discretion that I may have to send it to a jury is because I think that if I am to decide otherwise than I am deciding, this Court would be flooded in cases assigned to the Chancery Division, with applications to send particular issues to a jury, when I am quite satisfied it was not the intention of the Legislature that actions should be so treated, and we should have not only the difficulties that we had before, and the inconvenience arising from suitors being bandied about from one Court to another, but all those difficulties and inconveniences would be increased one hundredfold. I must, therefore, refuse this application, and the Defendant will have the costs of it in any event.

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D. P.

The Plaintiff appealed, and the appeal came on to be heard on the 18th of February, 1885.

C. A.

Higgins, Q.C., and *Beddall*, for the Appellant:—

The question is, whether this case comes within rule 3 or rule 6 of Order XXXVI. We say it comes under the latter, not the former. The action is not one assigned to the Chancery Division, for we do not ask for the execution of a trust, but only for a declaration that a debt is due from the trustee and for payment. An equitable debt can be sued for in any Division. The action is one for a sum of money, and the only question is whether it is due. We contend that where an action in part properly belongs to the Queen's Bench Division the case is excluded from Order XXXVI., rule 3, and is governed by Order XXXVI., rule 6. We ought not to lose our right to a jury because we have joined a claim which

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is proper for the Chancery Division. Supposing the case one of discretion, it comes within the decision of Mr. Justice *Pearson* in *Cardinall* v. *Cardinall* (1).

[BOWEN, L.J.:—The argument against you is, that you have chosen the Chancery Division, perhaps you were obliged to do so; but at all events you have done so, and it is most convenient that the whole action should be tried together.]

At the time when the action was commenced the Plaintiff had a right to a jury whether in the Chancery Division or the Queen's Bench Division. She still has a right to an action in the Queen's Bench Division, and ought not to lose it because she joins a cause of action proper for the Chancery Division. The words "assigned to the Chancery Division," cannot apply to a case part of which relates to matters not so assigned. But if the case falls within rule 3, we ask that the discretion of the Court may be exercised by ordering a trial by jury, an issue of fact of this kind being best tried in that way. If the Court is against us on this ground we ask liberty to amend by striking out our second cause of action.

Cookson, Q.C., and *Speed*, for the Defendant, were not called upon.

BAGGALLAY, L.J.:—

In this case questions arise as regards the application of rules 3 and 6 of Order XXXVI. to an action which has been attached to Mr. Justice *Pearson's* branch of the Chancery Division. The action is of a peculiar character. The Plaintiff, by her statement of claim, in the first place asks to have it declared in effect that the Defendant was a trustee of a sum of £700 for her, and to have the necessary and proper accounts taken as far as regards that sum of money, and consequential relief. There is added a claim which may be substantially described as a claim in detinue, demanding certain goods belonging to the Plaintiff, alleged to have been taken possession of by the Defendant and converted to his use. I think that the first portion of the statement of claim

(1) 25 Ch. D. 772.

taken *per se* is within the class of actions referred to in rule 3 as causes or matters assigned by the principal Act to the Chancery Division, and that if the second portion of the statement of claim were taken *per se* the action would be certainly an action not specially assigned by the principal Act to the Chancery Division, but, if assigned at all, assigned to the Queen's Bench Division. The Plaintiff in the exercise of her own discretion, or that of her solicitor, combined the two claims and commenced one action by issuing one writ in respect of the two matters, and selected the Chancery Division as the Division to which the action should be attached.

The defence is an utter denial of the Plaintiff's alleged case. It denies the creation of any trust in respect of the £700, but admits a loan of £700 as long ago as 1872 to the Defendant, and the Defendant states that he repaid it within a month or six weeks after the loan was made to him. This, if established, is of course a complete answer to the first part of the Plaintiff's case. As regards the second part of the statement of claim, the Defendant simply denies that he ever had the goods. Those are the issues which came under the consideration of the learned Judge. Now rule 3 provides that causes or matters assigned by the principal Act to the Chancery Division, which covers the first part of the action in this case, shall be tried by a Judge without a jury unless the Court or a Judge shall otherwise order. Such order could only be made upon an application to the Judge for that purpose. On the other hand, by rule 6, "In any other cause or matter"—which would be applicable to the second part of the claim—"upon the application of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury." Therefore in either case the party wishing for a trial by jury would have to apply to the Judge for an order for such trial, either to take the case out of the operation of rule 3, or to bring it within the operation of rule 6. Consequently a summons was taken out before Mr. Justice *Pearson* asking, among other things, that the action should be tried with a jury. The learned Judge has gone very carefully into the case and he has come to the conclusion that, having regard to all the circumstances, it is not a case in which

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there should be a trial by jury, and therefore he refused the application.

Reference has been made in the course of the argument to a former decision of Mr. Justice *Pearson* in *Cardinall* v. *Cardinall* (1), the first part of the marginal note of which is in these terms: "An action, which falls within one of the classes of actions which . . . are specially assigned to the Chancery Division will not be sent for trial by a jury unless it involves a simple issue of fact, the determination of which will decide the action." When I first read that marginal note it occurred to me that that was in effect saying that if the action did involve a simple issue of fact the determination of which would decide the action, it should be sent for trial by a jury. I think, however, that, if fairly interpreted, it only means that unless it involves a simple issue of fact it will not be sent to a jury, but not necessarily that in every case if there is a simple question of fact it will be sent to a jury. When, however, I look at the judgment of the learned Judge I think it supports the other interpretation, for I find the learned Judge saying (2), "I do not think it was the intention of the Legislature, or of the Judges who framed the new rules, that such a case as the present should be tried by a jury. I think the intention was, that if it appeared that there was a simple question of fact, the verdict upon which would decide the issue in the action, it should be sent for trial by a jury." Now, with regard to the case with which the learned Judge was dealing, possibly this statement of opinion may be quite right, but I am not prepared to concur in the view, that in every case in which there is some simple question of fact which will decide the whole of the matters in issue, it is to be sent to a jury. I can very well imagine a simple issue of fact, arising in an action properly assigned to the Chancery Division, upon which the Judge is as capable of deciding as a jury, and as to which it would be an unnecessary expense to have a trial by jury. I think in each case the Judge to whom the application is made must be guided by the circumstances.

I do not propose to go in detail through the reasons assigned by Mr. Justice *Pearson* for the conclusion at which he arrived.

(1) 25 Ch. D. 772. (2) 25 Ch. D. 777.

The case falls within a class of cases which the Judges of the Courts of Chancery constantly had to decide, and did decide. I entirely agree in the conclusion at which the learned Judge arrived, that this was not a case in which the matter should be sent to a jury. I think that it would be extremely inconvenient in practice if in an action which is substantially an action to try a question properly cognisable in the Chancery Division, the plaintiff, merely by tacking on some simple Common Law demand, should enable himself to raise the question whether the whole of the action should not be tried by a jury, which would lead to an enormous expense. I see no reason to differ from the conclusion at which the learned Judge has arrived.

I do not think that we ought to give liberty to amend. The question of amendment was not raised by the summons upon which the learned Judge proceeded. I gather from what has been said here that the matter was suggested in the course of the argument, or probably at the close of the argument, after the views of the learned Judge had been ascertained. If there is a case for amendment, there is a mode by which leave to amend can be obtained, but I think this Court should make no order on the subject.

BOWEN, L.J.:—

I am of the same opinion. In the first place this is an appeal from the discretion of the Judge, and although the discretion of the Judge with respect to the mode of trial is a discretion which ought to be exercised with great care, the Judge below, who has all the facts before him, has a certain margin of discretion, which ought to be left to him, and therefore appeals of this sort ought not to be brought except in clear cases. I think it is obvious that in the present case we cannot interfere. First of all, this is a case which is assigned to the Chancery Division. The Plaintiff asks for the execution of a trust. She asks also for something else, but she asks for that, and therefore the action is assigned to the Chancery Division by sect. 34 of the *Judicature Act*, 1873. Now, being assigned to the Chancery Division, it falls directly under Order XXXVI., rule 3, which says that causes assigned to the Chancery Division are to be tried by a Judge without a jury

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unless the Court or a Judge shall otherwise order. It is to be tried without a jury unless the parties can satisfy the Judge that he ought to send it to be tried with a jury. Therefore it rests upon the Appellant to shew the Judge below in the first instance that there was reason for sending this case to be tried by a jury. Now, in considering whether a case should be tried by a jury or not, I certainly should be very loth to say that we must go simply upon the paper pleadings, because that would put the Court at the mercy of a man who chose to put on paper a claim or a counter-claim which he had no means whatever of supporting. The Court is always at liberty to find out what is the real question to be tried when it is considering what tribunal ought to try it. Here, however, we have nothing but paper pleadings, which I treat as *bonâ fide* pleadings. What was there to induce the learned Judge below in the first instance to send the case to be tried by a jury or to induce us to say that he was wrong in refusing to do so? Nothing at all, except that to the claim for the execution of the trust, which has brought the case within the Chancery Division, a claim in detinue is added.

Now Order XXXVI., rule 3, gives the Court discretion to decide upon the mode of trial in a class of cases of which this is one. That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed, but still it is a discretion, and for my own part I think that when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the Court do so? As to *Cardinall* v. *Cardinall* (1), though it is very convenient that a Judge of first instance, who is going to exercise the discretion in these cases from day to day, should indicate to those who are practising before him the kind of way in which his mind operates on such questions, still when he does so he is not laying down a rule of law nor fettering his own discretion, and, *à fortiori*,

(1) 25 Ch. D. 772.

although it is of great value to hear anything that such a master of practice as Mr. Justice *Pearson* says on such a subject, he cannot fetter the discretion of another Judge where the rule has left the discretion open. If it were wished to lay down rules as to how a Judge should act about sending cases to be tried by jury, I do not think that anything could be laid down more definite than this, that as the mode of trial by jury differs in many respects, which lawyers know, from trials before a Judge without a jury, the Judge must carefully consider what those differences are, and what are the facilities for trial in the one case and in the other, and then apply his mind to the facts of the special case and see how the case can be most justly and most conveniently tried.

In this particular case it seems to me that the onus has not been satisfied by the Appellant. He has not shewn us in the first place any good reason why this case should not be tried in Chancery, and certainly he has not satisfied us that the discretion of the Judge below was wrongly exercised.

FRY, L.J.:—

I am of the same opinion. It seems to me that this case falls within the 3rd rule of Order XXXVI., which provides that cases assigned by the principal Act to the Chancery Division shall be tried by a Judge without a jury unless the Court or a Judge shall otherwise order. In my opinion this was a case assigned to the Chancery Division. It was a case which was in substance and principally an action for the execution of a trust. It was not the less an assigned case because to that cause of action another unassigned cause of action was added. That being so, it is plain that, *primâ facie*, this case must be tried by a Judge without a jury. But then there is a discretion given to the Court or a Judge to order otherwise. Mr. Justice *Pearson* has not thought fit to order otherwise. We have heard all that can be said in favour of a review of that discretion, and I see no reason whatever to differ from the conclusion at which he has arrived.

Solicitors for Plaintiff: *Longcroft & Wade.*
Solicitors for Defendant: *Taylor, Hoare, Taylor, & Box.*

H. C. J.

C. A.
1884
CHITTY, J.
Oct. 31.
1885
C. A.
Feb. 18, 19.

STEVENS *v.* METROPOLITAN DISTRICT RAILWAY COMPANY.

[1884 S. 639.]

Railway Company—Power to underpin Buildings on adjoining Lands—Retaining Wall of Railway—Wall built with double Object—Appeal for Costs.

A railway company had power to underpin or strengthen buildings on lands adjoining their line. They carried their line in a deep cutting close beside a building belonging to the Plaintiffs, and having given the required notice that they intended to underpin this building, they made a wall of concrete to support the Plaintiffs' building, part of the thickness of which was under the Plaintiffs' building, and part on the company's land, the whole wall forming the retaining wall of the railway cutting:—

Held (reversing the decision of *Chitty*, J.), that the fact that the concrete wall was also the retaining wall of the railway did not make it the less an "underpinning" within the meaning of the Act; and therefore that the company had not acted beyond their powers in making the wall on the Plaintiffs' land.

Where the jurisdiction of a Judge to inflict costs on a party arises from his being guilty of breach of an injunction or other misconduct, an appeal lies as to costs, although the Judge makes no order except that the party shall pay costs.

Witt v. *Corcoran* (1) followed.

THE Plaintiffs were the owners of a manufactory, shop, and stables, Nos. 108 and 109 *Whitechapel Road*. The *Metropolitan District Railway Company* being desirous of carrying their railway through a portion of the premises, gave notice under their Act passed in 1883 to take part of the stables and yard adjoining. The Plaintiffs thereupon gave notice to the company that they required them to take the whole of the property if they took part, and on their refusing, the Plaintiffs brought an action against the company for an injunction to restrain them from taking the portion of the property comprised in the notice to treat without taking the whole. On the 21st of March, 1884, the Plaintiffs moved for an interim injunction, and Mr. Justice *Chitty* granted an injunction restraining the Defendants from taking, or proceeding to take, any part of the premises without taking the whole.

The company, in consequence of this injunction, altered the

(1) 2 Ch. D. 69.

line of their proposed railway so as to avoid passing through any part of the Plaintiffs' property, but brought the line just outside the wall of the stable, in a cutting about sixteen feet deep.

On the 27th of March, 1884, the company served notice on the Plaintiffs that they withdrew and abandoned their notice to treat.

On the 31st of March, 1884, the company served notice on the Plaintiffs that they would require to underpin the stables and yard at the rear of Nos. 108 and 109 *Whitechapel Road.* The notice was given under the power contained in the 14th section of the *Metropolitan and District Railways* (*City Lines and Extensions*) *Act*, 1879 (1).

(1) 42 & 43 Vict. c. cci, s. 14: "And whereas in order to avoid injury to the houses, cellars, and buildings within 100 feet of the railways, it may be necessary to underpin or otherwise strengthen the same; be it enacted that the two companies (the *Metropolitan Railway Company* and the *Metropolitan District Railway Company*) may, at their own costs and charges, underpin or otherwise strengthen any such house, cellar, or building, provided that at least ten days' notice shall (unless in case of emergency) be given to the owner, lessee, and occupier of the house, cellar, or building, intended to be underpinned or otherwise strengthened (each such notice to be left on the premises) and that the two companies shall be liable to compensate the owner, lessee, and occupier of every such house, cellar, or building, for any inconvenience, loss, or damage which may result to them by reason of the exercise of the powers granted by this enactment: Provided also, that if the owner, lessee, or occupier of any such house, cellar, or building shall give, within seven days after that notice, counter-notice in writing that he disputes the necessity of such underpinning or strengthening, the question of the necessity shall be referred to an engineer to be agreed upon, or in case of difference, to a civil engineer to be appointed at the instance of either party by the President of the Board of Trade for the time being, and such referee shall forthwith, upon the application of either party, proceed to inspect such house, cellar, or building, and determine the matter referred to him; and in the event of his deciding that such underpinning or strengthening is necessary, he may, in his discretion, prescribe the mode in which the same shall be executed, and the two companies may and shall proceed forthwith so to underpin or strengthen the said house, cellar, or building; and the cost of such referee shall be paid by the two companies, and the cost of the reference (other than the cost of the referee) shall be in the discretion of the referee."

Sect. 17 provided that the provisions as to underpinning and strengthening should not relieve the two companies from the liability to compensate under the 68th section of the *Lands Clauses Consolidation Act*, or otherwise.

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The Plaintiffs gave no counter-notice that the proposed works were not necessary, and the company proceeded to excavate the Plaintiffs' land, and to build a concrete wall about five feet thick, underpinning the wall of the Plaintiffs' stable which adjoined the railway. About four feet five inches of the thickness of this concrete wall was under the Plaintiffs' wall, being imbedded in the Plaintiffs' land, and the remaining thickness, from five to nine inches, was on the Defendants' land. The concrete wall, when completed, formed the side or retaining wall of the railway cutting.

The Plaintiffs, considering that what had been done amounted to a taking of part of their land, moved for a sequestration against the company for a breach of the order of the 21st of March, 1884.

Affidavits by engineers were filed on both sides, those on behalf of the Plaintiffs alleging that the wall was the retaining wall of the railway, which was necessary to support the lateral pressure of the earth, independently of the safety of the building; those on the Defendants' behalf stating that the wall was built for the real purpose of underpinning the building.

The motion was heard before Mr. Justice *Chitty* on the 31st of October, 1884.

Romer, Q.C., and *Cripps*, for the Plaintiffs.

Macnaghten, Q.C., and *G. M. Freeman*, for the company.

CHITTY, J.:—

This is a curious case, and the only point after all is one of fact, whether this work which has been executed in fact in part under and in part outside the Plaintiffs' land is really an underpinning work for the purpose really of supporting this stable, or whether it is part of the retaining wall of the railway. The Plaintiffs say that under colour of a power contained in the 14th section of the Act of 1879, the Defendants have built a retaining wall under this property for the purposes of their own railway. On the other hand the Defendants say that what they have done is merely

acting strictly in accordance with the section which gives power to underpin and strengthen the Plaintiffs' stables.

The question really is whether what has been done is mere underpinning or whether it is not something more, namely, the building of a retaining wall. Of course, it is not in any sense conclusive to say that the Defendants' witnesses call it a retaining wall, because they may make a slip, but I do find that one of them spoke of a concrete wall to act as a retaining wall of the Defendants' railway cutting: that he afterwards corrects, and there is evidence on the part of the Defendants that the whole of this work was required for the purpose of supporting the Plaintiffs' stables.

The 14th section certainly does not apply to land or ground which the companies take: it is a work which has to be executed for the benefit of persons who may have houses, cellars, or buildings within 100 feet of the railway, and where it is necessary to underpin or otherwise strengthen those houses, cellars, or buildings the companies have power to enter and do the work. It is a section put in no doubt for the protection of the railway company, who might otherwise find themselves exposed to serious claims for injuries done to houses which they did not take. Originally the Defendant company proposed to take a portion only of the Plaintiffs' property including the stable or some part of it, and an injunction was granted restraining them from doing that. Then some ingenious person thought of the 14th section, and what the company has done is to build a strong work under the Plaintiffs' property extending a distance of some four feet five inches within the Plaintiffs' boundary, and a portion of the work extends beyond. As far as I can make out, there is some slight physical division between the part which is on the Plaintiffs' ground and the five inches, or, as the Defendants say, nine inches, which are on the ground purchased by the railway company, and which ground is altogether outside, by that distance, the Plaintiffs' boundary.

It appears to me, having regard to the whole evidence in this case, that this is substantially a portion of the railway company's works. The railway cannot alienate any part of those works which is necessary to the construction and maintenance of the railway,

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as was decided by the late Master of the Rolls in the case of *Mulliner* v. *Midland Railway Company* (1). I think on the true effect of the evidence that under colour of underpinning the Plaintiffs' stables they have really made a work which was necessary for the purposes of their own railway. A five inch wall, or a nine inch wall, would unquestionably not be such a wall as would protect the railway itself from the lateral thrust of the neighbouring ground. I think, though this is a nice point, that this is substantially a retaining wall as it was called in the first instance, although it also fulfils the office of underpinning the Plaintiffs' building. It seems to me that the company have violated the injunction.

The Plaintiffs not pressing for an order for attachment to issue the order made was as follows: "This Court being of opinion on consideration of the facts disclosed by the affidavits that the Defendants, the *Metropolitan District Railway Company*, have committed a breach of the injunction, doth order that the Defendants pay the Plaintiffs their costs of this motion, with liberty to apply."

C. A. From this order the Defendants appealed. It was agreed between the counsel that the argument should be confined to the effect of the 14th section of the *Metropolitan and District Railways* (*City Lines and Extensions*) *Act*, 1879.

Macnaghten, Q.C., and *G. M. Freeman*, for the Appellants:—

We are restrained from taking the Plaintiffs' land, but we say we are not taking it, we are only claiming to exercise a statutory power which can be exercised without taking the land. To take, means to take by notice under the powers of taking land. The *Metropolitan and District Railways* (*City Lines and Extensions*) *Act*, 1879 (42 & 43 Vict. c. cci.), s. 14, expressly authorizes us to underpin, and sect. 15 provides for compensation to the owners for damage done, which shews that underpinning is not taking land. The Judge below decided that there was a trespass, and that we had appropriated part of the Plaintiffs' land. We say that we have not appropriated any part of their land, and that

(1) 11 Ch. D. 611.

there is no trespass, because what we have done is authorized by our Act. That the underpinning will also serve the purpose of a retaining wall and save us the expense of making one is no reason for taking away our power to underpin. Nobody can suggest any reason why we should put in more work than is necessary to keep the buildings up; and our evidence shews that we have done no more.

Romer, Q.C., and *Cripps*, for the Plaintiffs:—

No order was made on the motion for sequestration except that the Defendants should pay the costs. This is, therefore, an appeal for costs only, and cannot be sustained.

It was never intended by the Act that if apart from sect. 14 it would be necessary to do certain works and take certain lands, the company instead of doing so might resort to this section. The section was intended to provide for what must be done in addition to a proper retaining wall. Underpinning does not mean propping up the building to prevent a lateral slipping of the earth but strengthening the structure of the building, the object being to avoid excessive amount of compensation for injury from shaking. All the experts agree in this, that the company must have built a retaining wall if there were no buildings, otherwise the side of the cutting would have slipped. If they had done so, no underpinning would have been necessary, but in that case they would have had to purchase our land as their wall encroaches on our land. Therefore they have used the statutory powers for underpinning for a purpose not intended by the Act. No underpinning was really necessary, because a proper retaining wall would have been sufficient for all purposes.

Macnaghten, in reply.

BAGGALLAY, L.J.:—

The *Metropolitan District Railway Company* were authorized by their Act of 1883 to take certain land, which was scheduled, for the construction of a railway thereon, and amongst the land scheduled was a portion of the land belonging to the Plaintiffs. The Plaintiffs' property consisted of a house and shop with a

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yard and certain outbuildings, and amongst others a stable, and on the 3rd of December, 1883, the company gave notice of their intention to take a portion of the Plaintiffs' land consisting of the stable and part of the yard. That was met by a counter notice, which was given by the Plaintiffs, requiring the railway company if they took a part to take the whole. The Plaintiffs, having commenced proceedings for the purpose of restraining the railway company from acting upon their notice to treat for a portion only, an order was made by Mr. Justice *Chitty* restraining the railway company from taking any part of the Plaintiffs' land without taking the whole.

The railway company not being willing to comply with the demand of the Plaintiffs then looked about to see what they could do in order to avoid the necessity of taking the whole of the land, and they endeavoured to avail themselves of the 14th section of an Act passed in the year 1879. Various powers and privileges contained in and conferred by the Act of 1879 were continued to the company with respect to the property they were authorized to take under the Act of 1883, and, therefore, this section has application to the property in question. The language of the section is as follows: "And whereas in order to avoid injury to the houses, cellars, and buildings within 100 feet of the railways it may be necessary to underpin or otherwise strengthen the same." Now I pause there for a moment. It must be borne in mind that this is an Act for the construction of a railway through a portion of the Metropolis where there are many buildings, and, therefore, one can well understand, particularly if there were buildings erected many years ago, that there would be great probability, either in the construction or working of the railway, that those houses might be shaken to an extent that might imperil their existence. As I read the preamble of the section it amounts to this: that in order to avoid injuries occasioned by the construction or the working of the railway to houses, &c., it may be necessary to underpin or otherwise strengthen the same. Then the section provides that "the companies may, at their own costs and charges, underpin or otherwise strengthen any such house, cellar, or building provided that at least ten days' notice shall (unless in case of emergency) be given to the owner." It has been suggested that there

was a power conferred upon the railway company not only to underpin but to strengthen the portion of the building that was above the land, as in the case of a church to the extent of repairing a steeple. I do not think it is necessary to go into that argument. Then the section proceeds "the two companies shall be liable to compensate the owner, lessee, and occupier of every such house, cellar, or building for any inconvenience, loss, or damage which may result to them by reason of the exercise of the powers granted by this enactment." Thus far it would appear that the power of determining whether it is necessary to underpin any particular house, cellar, or building rested with the companies. At any rate they are to take the initiative. Then it goes on to provide what the owner or occupier may do if he disputes the necessity: "Provided, also, that if the owner, lessee, or occupier of any such house, cellar, or building shall give, within seven days after that notice, counter-notice in writing that he disputes the necessity of such underpinning or strengthening," the question shall be referred to an engineer to be agreed upon. I need not follow that any further.

In this particular case the railway company sought to avail themselves of the provisions of this 14th section, and on the 31st of March, 1884, the injunction having been granted against them on the 21st of the same month, they gave notice of their intention to underpin the stable belonging to the Plaintiffs. It does not appear that any counter-notice was given disputing the necessity for the underpinning, but the underpinning having been commenced, on the 9th of May a motion was made to enforce the original order, which restrained the railway company from taking any of the Plaintiffs' land, by sequestration. The course which the learned Judge thought it right to take was this, he made no other order than that the railway company should pay the costs of the Plaintiffs with liberty to apply. With reference to that, an objection was taken, or rather a suggestion was made, that this was merely an appeal in respect of costs, and that the Court could not entertain it. But the order is prefaced by this recital:— "This Court being of opinion, upon consideration of the facts disclosed by the affidavits, that the Defendants, the *Metropolitan District Railway Company*, have committed a breach of the

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injunction, doth order, &c." Therefore, following the decision in *Witt* v. *Corcoran* (1) to the effect that the preamble should be regarded as a part of the order, we were of opinion that the objection that was suggested was of no importance. It must be considered that Mr. Justice *Chitty* in ordering the defendants to pay the costs of the motion, in fact decided that what the railway company had done was a breach of the injunction. Considering the course of conduct pursued by both parties, we are free from all objections on the one side or the other of a purely technical character. Mr. *Macnaghten* admitted, and the admission was accepted by Mr. *Romer*, that if he was not right under the 14th section of the Act of 1879, the order must stand, his contention being that what had been done was authorized by that section. Otherwise the railway company, having first given notice of their intention, which was based upon the supposed necessity of underpinning, and that notice not being acted upon, and the parties standing by and seeing all the expense incurred without raising any objection at all until they come to the Court to sequestrate for breach of the injunction, that might have had a material bearing upon the conclusion to which I should have come if we were merely considering the propriety of the order that was made. But it is unnecessary to decide that question, having regard to the admissions which I think were very properly made between the parties, and therefore we simply have to consider the question whether what has been done by the railway company has been done by them under the authority conferred upon them by the 14th section.

Now the facts may be very shortly stated. Having given notice to underpin, as I have before stated, the company commenced to underpin in the ordinary sense of the word, that is to say, they excavated beneath the stable which was to be underpinned, and beneath the stable they introduced a wall of concrete which they built from somewhere about the same level as the bottom of their railway works right up to the wall, or the footings of the wall, of the stable, and in that way, according to the ordinary use of the word underpinning, the stable was underpinned. For a certain length of the stable, and for a certain depth, rather

(1) 2 Ch. D. 69.

more than four feet, the depth is not very material, a wall of concrete was inserted beneath the stable, and it must be borne in mind that that wall was entirely on the Plaintiffs' land, and not upon land which the railway company had acquired by purchasing it under their compulsory powers. I must also make this observation as bearing upon the case, that in addition to the wall which they had so placed under the Plaintiffs' stable and built up to the footings of the wall of the Plaintiffs' stable, alongside or against that and throughout its whole length, as I understand, they built another wall of concrete nine inches or thereabouts in width against that former wall, and that additional portion was built, to some extent at any rate, upon their own land.

Now the contest on the part of the Plaintiffs is this: that that was not an underpinning within the intent and meaning of the 14th section of the Act of Parliament; that if there had been no underpinning at all, the railway company must have built a retaining wall at that place, and for this reason—that that portion of the railway was in a cutting sixteen feet deep below the surface, and it was a cutting through a soil which would not stand upright or nearly upright by itself, that it would have been essential, apart altogether from the fact of the stable on the land above, that a retaining wall should be built there and a wall strong enough to prevent the lateral thrust of the soil. There could be no doubt whatever that the object of underpinning was to secure a firm foundation for the stable which was above, in other words, it had to be strong enough to bear the vertical pressure, and to provide a solid foundation upon which the footings of the stable wall should rest, and thereby to prevent the wall being subject to those oscillations and vibrations which, if there had been a loose soil below it, it would have been rendered liable to, not only by reason of the cutting itself but by reason of the vibration caused by locomotives passing over the railway, whether in the course of its construction or after it was opened.

This wall was constructed in the way I have mentioned; there does not appear to me to be any difference of opinion between the witnesses on the two sides as to what was actually done, the difference appears to be in what they call it. The witnesses on the one side say that although that wall was in fact an under-

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pinning it was practically and really a retaining wall; that it took the place of a retaining wall; that a retaining wall would be necessary if there had not been that underpinning there, and therefore for all intents and purposes it was a retaining wall.

In the first place, I cannot regard it as a retaining wall. A retaining wall built by the Defendants must have been built upon land of which they had acquired the ownership, but by the admission this is entirely built upon land belonging to the Plaintiffs. It was, therefore, not really and strictly speaking a retaining wall.

But the argument which seemed to me at first sight to have most force in it was this. True it is that it was an underpinning wall, but it saved the company the expense of making a retaining wall which they otherwise would have had to make, though possibly not quite so thick or so massive, for the purpose of preventing the lateral thrust of the soil, and therefore if it was not strictly a retaining wall it must be considered as if it had been a retaining wall. Now I quite admit that such may have been the result, but I have difficulty in seeing why, if the railway company have done that which the Act of Parliament authorizes them to do, the mere fact that their doing that has saved them the expense of doing something else, is to be considered as an unlawful act—if otherwise it would have been a lawful act. I have not myself any doubt in this case upon the evidence that the underpinning of this house was an absolute necessity, not, as I said before, by reason of the railway company having so considered it and giving notice on the footing of it (and there is no contest upon that point), but simply upon the evidence adduced before us. It appears to me that for the purpose of protecting this stable in the way in which there was authority given to protect it by the 14th section of the Act, the construction of this underpinning was absolutely necessary. Therefore I think, on consideration, that this objection is not well founded.

I only desire to add this observation upon the evidence. As I said before, I do not see that there is any substantial difference between the witnesses on the one side or the other as regards what was done. But, calling themselves experts in matters of this kind, the witnesses on the one side call what was done one

thing, and the witnesses on the other call it another. They take upon themselves to say whether or not it is underpinning within the meaning of the 14th section. They take upon themselves to construe that which it is our duty to construe.

Upon the whole, I have come to the conclusion in this case that what the railway company have done they had a right to do, and in the doing of it they have not been guilty of a breach of the injunction granted on the 21st of March, 1884. Therefore, being of opinion that the order of Mr. Justice *Chitty* should be discharged, I think it will be desirable to alter the declaration in the manner which Lord Justice *Fry* has suggested, and which he will state in his judgment.

There are various other points which might have been raised, therefore it will be convenient to enter the admissions made by Mr. *Macnaghten* and assented to by Mr. *Romer*.

BOWEN, L.J.:—

I am of the same opinion. I wish to begin the very few remarks I have to make by pointing out that in consequence of Mr. *Macnaghten's* admission we are relieved from the necessity of considering whether what was done, even if it was illegal, was necessarily a breach of the injunction, and that we are really only discussing the question now whether what has been done is protected by sect. 14 or not.

Now, no doubt this is a case which raises one's suspicions as regards the railway company, and I think it becomes very important to look into it carefully, because it seems to me that in the end, by using sect. 14, as I agree in thinking, legitimately, the railway company have gathered to themselves a resulting benefit which it was not intended under that section they should ever get. They have got a windfall, so to speak—a benefit outside the intention of the section. It is not denied that what has been done has been done *bonâ fide*, and if that is so, the mere fact that they have got this resulting benefit is not a reason, as it stands alone, for denying that what has been done is legitimatised by this section. This is a section, as has been pointed out, for the protection of railway companies. Railway companies in running through a town no doubt were subject to numerous

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claims, and claims which, I daresay, were fought in an expensive way, and led to a great deal of expenditure of money on the part of the railway companies—claims in respect of houses which were injured by the works of the railway companies. This section was introduced in order to enable the railway companies to lessen their liability to loss or compensation, by going upon land which *primâ facie* was not their own, and doing certain works to support the houses. Of course, the owners of houses which had been supported at the expense and charge of the railway companies could not afterwards come upon the railway companies to the same extent for compensation.

Now, in construing the section, it must be remembered, as was pointed out early in the argument by Lord Justice *Fry*, that this is an enactment which, if the contention of the railway company is true, enables them to go upon another person's land. They can only do so where the underpinning is necessary to avoid injury to the house. The first observation is, that the company ought not to go upon the land of somebody else to underpin, if upon their own land they can obviate the necessity for underpinning. Here there is no evidence, I think, that they could upon their own land, or without going upon the Plaintiffs' land, have obviated the mischief of injury to the house. On the contrary, there is evidence the other way. But the second observation is that it is not necessary, within the meaning of the section, to go upon another person's land to underpin, if you do what is not underpinning when you get upon his land. You must not execute any sort of work you like, because you cannot underpin without going upon his land. You are still limited by the reasonable necessity of the case. Here, however, I think the effect of the evidence is, that no more has been done in the way of underpinning than was necessary in fact.

Then comes the second point which is put against the railway company. This section is intended to protect them against liability to loss in case of injury to the house. There was another liability under which they rested like all other companies—the liability to loss in case they did injury to land. The section gives the railway company a statutory right to protect themselves against the former liability by underpinning. They took advantage of it

in order to protect themselves against the second risk of injury to land, and it has been urged upon us by the counsel for the Respondents that the case is therefore not within sect. 14. I think the answer is that the existence of the collateral object does not destroy the necessity, if once the necessity does exist, of carrying out the primary object. Of course if it were not *bonâ fide* done then there would be an end to the question, but if what is done is *bonâ fide* done, what is necessary *ex hypothesi* for carrying out object A does not cease to be so necessary because it happens to be efficacious for effecting object B. The railway company are entitled to the windfall of this resulting benefit if they honestly carry out the section.

Upon those grounds I agree with the construction which has been put upon sect. 14 by the Lord Justice, and it does not seem to me at all necessary in this case to consider the part of the section which relates to the notice to be given or the counter-notice, because that point does not really arise.

I have only one word more to say. I also agree with the Lord Justice as to an appeal lying in this case. I think the case of *Witt* v. *Corcoran* (1) is in point, and I also think that in principle an appeal lies. Where the Judge's jurisdiction over costs depends upon the existence of some breach of an injunction or misconduct, it seems to me that an appeal lies against his finding that there has been a breach of the injunction or misconduct, even although he only inflicts costs. Such a case is not, I think, within Order LXV., rule 1. It really is an appeal against the finding by means of which the Judge clothes himself with the jurisdiction to inflict costs. I think that is really what has been laid down in several cases recently by the Court of Appeal, and amongst others in the case of *In re Milton* (2).

FRY, L.J.:—

I am of the same opinion. The question which we have to determine is with regard to the application of the 14th section of the Act of 1879 to a structure about which we have heard now so much. Two arguments, and two arguments only, appear to me to be necessary to refer to in expressing my decision.

(1) 2 Ch. D. 69. (2) 53 L. J. (Q.B.) 65.

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It has been argued in the first place for the Plaintiffs, that no necessity can exist under the 14th section for the construction of the underpinning or other strengthening structure if the construction of the retaining wall upon the land of the railway company would have effectuated the same purpose as the underpinning or other strengthening structure, and it has been suggested that in the present case the construction of the retaining wall upon the Defendants' land would have effectuated that purpose, and therefore it was said that the railway company had no authority to construct their underpinning wall. I have stated the argument which I conceive to have been rather suggested than pointedly put forward, but unless it amounts to that it seems to me to amount to nothing.

Now I do not desire to express any opinion upon the first question whether it is necessary in order to give rise to the operation of the 14th section to shew that no works upon the Defendants' land would have answered the purpose intended by the underpinning. It is enough for me say that in the present case there is no evidence whatever to shew that a structure upon the Defendants' land would have effectuated the same purpose as the underpinning structure. On the contrary, I find the evidence of Mr. *Clarke*, one of the expert witnesses for the Plaintiffs, agreeing with the evidence of the Defendants' witnesses, that even if a retaining wall had been erected on the Defendants' land some underpinning structure would have been necessary. I think, therefore, that argument entirely fails upon the facts of the case.

Then the second suggestion is this. It is said that the structure could not be an underpinning structure within the section in question, if it subserved the purpose of retaining the lateral pressure of the earth.

Now one must inquire what are the requisites of an underpinning structure in order that it may be efficient to answer the purpose for which it is to be constructed. In the first place, it is obvious that it must be adequate to support the vertical pressure of the house or building which it underpins and to which it is subjacent. In the next place, it appears to me equally clear that it must be competent to resist all destructive forces which may

operate upon it in the situation where it may be placed. Suppose, for instance, you were underpinning a building which was exposed to wind, like the *Tay Bridge*, it is clear that the underpinning structure must be competent to resist the wind. Suppose the circumstances were such that it was exposed to decay from the action of the atmosphere, it must be plainly of such a substance as will resist the tendency to decay. And supposing it is placed in such circumstances that it is exposed to lateral pressure, it appears to me equally clear that it must be competent to resist the lateral pressure. If it be not competent and capable of resisting these destructive forces, it will not answer its purpose; it will not underpin, it will give way, and the building above will come down. Does it make any difference that in answering those purposes which are absolutely necessary for the main purpose of underpinning the building, the structure does something else which is useful to the railway company? It seems to me that it does not deprive it of its underpinning character at all. It is quite true, as was observed in the present case, that it does to some extent relieve the railway company from the obligation to erect a wall which they would otherwise have had to erect. The retaining wall would have had to be a stronger one than the wall which they have put upon their own land, but it was none the less an underpinning structure because it happens to answer that purpose. Nor can I entirely agree with the suggestion that such a view must have been absent from the mind of the Legislature; because in thinking of a work of the description carried into effect by this railway company—a railway to be constructed for the most part at a lower level than the *London* streets, it seems to me that the Legislature, if it thought about it at all, must have known that in underpinning houses or buildings where the railway was at a lower level, the underpinning structure or wall must subserve the purpose also to some extent of a retaining wall. I cannot think therefore that there is anything unfair in holding that this structure is one within the meaning of the 14th section.

I entirely agree therefore in the conclusion arrived at by the other members of the Court. I think this will express the judgment of the Court. "It having been agreed between the counsel

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for both parties that the order of Mr. Justice *Chitty* should be affirmed or discharged according to the decision of this Court on the true construction of the 14th section of the *Metropolitan and District Railways (City Lines and Extensions) Act*, 1879, and this Court being of opinion that according to the true construction of that section the Defendants were authorized to construct on the Plaintiffs' land the wall there constructed by them, discharge the order of Mr. Justice *Chitty*, and order the Plaintiffs to pay the costs of the Defendants here and in the Court below."

Solicitors: *Houghtons & Byfield; Baxters & Co.*

M. W.

C. A. 1885 *Feb.* 21.

In re McCONNELL. SAUNDERS *v.* McCONNELL.

[1883 M. 3635.]

Appeal—Note of Judgment of Court below.

A decision on the construction of a will was reversed on appeal, but the Court, on the ground that it was not furnished with any information as to the reasons given by the Judge for his decision, refused to make any order as to the costs of the appeal.

J. E. McCONNELL by will, dated the 28th of November, 1882, gave to his son *Quentin* a life annuity of £70, to commence from the testator's death. By codicil, dated the 9th of June, 1883, the testator gave to trustees £3000 to be held in trust for the son for life, and after his death for the son's children, with words of reference to the gift of the annuity, which the son contended to have the effect of making the income of the £3000 commence from the testator's death, and not from the expiration of twelve months after the death. Mr. Justice *Pearson*, on motion by the son, decided that the income was only payable from the later date. The son appealed.

H. B. Buckley, for the Appellant.

Bardswell, contrà.

It appeared that no note of the judgment of Mr. Justice *Pearson* had been taken, and the Court had no information as to the reasons given by him for his decision.

FRY, L.J.:—

The Lord Justice *Bowen* has asked me to deliver the first judgment. It is not right that the Court of Appeal should be called upon to reverse the decision of a Judge without having any information as to the reasons given by him for that decision. In the present case Mr. Justice *Pearson* may have given reasons, which, if brought before us, would have led us to a conclusion opposite to that at which we have arrived. There is, however, no general order or rule of practice making it imperative on an appellant to furnish the Court of Appeal with the reasons given in the Court below, and we cannot therefore refuse to hear the appeal. [His Lordship then gave his reasons for holding that the income of the £3000 was intended to run from the testator's death.] The decision appealed from must therefore be reversed, but as the proper materials for enabling us to come to a correct decision have not been laid before us, we make no order as to the costs of the appeal.

BOWEN, L.J.:—

I am of the same opinion as to the point of construction. If there were any rule or order which enabled us to do so, we should decline to hear an appeal on a point of construction, unless we were furnished with a note of the judgment below. Both sides must be considered to be in default for not having supplied it, and we therefore make no order as to costs.

Solicitors for Appellant: *Norton, Rose & Co.*
Solicitors for Respondent: *Vallance & Vallance.*

H. C. J.

C. A.
1885
Feb. 13;
March 7.

In re HAZLE'S SETTLED ESTATES.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 58, *sub-ss.* 4, 6—*Tenant for Years—Tenant for Life—Estate determinable with Lease.*

A testator, who had granted a lease of a house for a term of thirty-one years from the 25th of March, 1859, at a rent of £50 a year, by his will, dated the 20th of June 1866, devised his freehold interest in such house to trustees upon trust to permit his wife to receive the rent for her own benefit "during the remainder of the term granted by the said lease if she should so long live," and in case she should die "before the expiration of the term created by such lease" then he gave and devised the house to the children of his brother in fee, and he directed that if his wife should "happen to live after the expiration of the term created by such lease" then the trustees should sell the house, and out of the income from the investment of the proceeds pay £50 a year to his wife during her life, and subject thereto he gave the residue of the proceeds for his brother's children. The testator died in 1866, and the question being raised whether his widow could, under the *Settled Land Act*, 1882, accept a surrender of such lease and grant a new lease of the house for a term of twenty one years from the 25th of December, 1883, at an increased rent:—

Held (affirming the decision of *Pearson*, J.), that the widow was not a person under sect. 58 of that Act entitled to the powers of a tenant for life and was therefore not able to accept a surrender and make a new lease of the house.

THIS was an appeal from the decision of Mr. Justice *Pearson* on a summons taken out by the widow and surviving trustee of the will of the testator *John Hazle*, for the direction of the Judge under sect. 56 of the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38). The facts, which are stated fully in the report of the case before that learned Judge (1), were shortly these:—

John Hazle, by his will dated the 20th of June, 1866, devised a public-house, called the *Walmer Castle* (which he had by a lease of March, 1859, demised to one *Abell Collins* for a term of thirty-one years from the 25th of March, 1859, at a rent of £50 a year), to trustees upon trust to permit and suffer his wife, *Maria Hazle*, to receive and take the rents thereof for her own absolute use and benefit during the remainder of the said term "if she shall so long live," and in case his said wife should die before the expiration of the term created by such lease, then he gave and devised the

(1) 26 Ch. D. 428.

house and premises to the children of his brother, *William Hazle*, in fee, and the testator directed that if his said wife should "happen to live after the expiration of the term created by the lease" then the trustees should sell the premises and stand possessed of the proceeds upon trust to invest such a sum as would produce £50 a year, which his said wife was to receive during her life, and subject thereto he gave the residue of such proceeds after the death of his wife unto the children of his brother *William Hazle*.

The testator died on the 20th of June, 1866. The widow of the testator, being desirous of accepting a surrender of the said lease of the public-house, the *Walmer Castle*, and of granting a new lease to the present tenant, if she had power to do so under the *Settled Land Act*, 1882, the summons, as previously mentioned, was taken out under that Act, upon which the direction of the learned Judge was sought as to whether, *inter alia*, the widow, *Maria Hazle*, was, under the provisions of the *Settled Land Act*, 1882, or otherwise, legally able to accept a surrender of the existing lease and grant a new lease as proposed. Mr. Justice *Pearson* was of opinion that he could not hold that the said widow was tenant for life of the public-house for the remainder of the term within the meaning of that Act so as to enable her to accept a surrender and make a new lease, and he accordingly decided against her having any power to do so.

Mrs. *Hazle* appealed.

Grosvenor Woods, for the appellant:—

The question is whether the widow, Mrs. *Hazle*, has the powers of a tenant for life under the *Settled Land Act*, 1882. If she is tenant for life within the meaning of that Act, she has power by sect. 6, sub-sect. 3, to lease for twenty-one years. By the trusts of the will she has a beneficial interest in the lease for a term co-extensive with the term of the lease, but it is said that directly she accepts a surrender of the present lease she ceases to be a tenant for life and therefore would have no power to grant a new lease. Reliance is placed on the large words of sect. 58, which gives the powers of a tenant for life under that Act to, amongst others, the following, when they have an estate or interest in possession, namely, sub-sect. 4: "a tenant for years determinable

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on life, not holding merely under a lease at a rent"; sub-sect. 6: "a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise"; and sub-sect. 9: "a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event." The difficulty as to Mrs. *Hazle* ceasing to have any estate or interest in possession within the meaning of the first part of sect. 58 as soon as she has accepted a surrender might be overcome by her previously contracting to make a lease under the large power given to a tenant for life by sect. 31, which by the latter part of that section could be enforced after the determination of such tenancy. The Act is an enabling Act, and ought therefore to be construed so as not to limit the operation and powers of the 58th section. [He referred to *Penny* v. *Penny* (1).]

Byrne, for the trustee:—

The widow has not under the will a term of years determinable by death, but an interest in the rent, and therefore her interest in the lease ceases on the determination of the term—as explained in *Co. Litt.* (2), "*terminus* in the understanding of the law doth not only signify the limits and limitation of time but also the estate and interest that passeth for that time." Here, by accepting a surrender of the lease all the interest of the widow in the rent and profits would cease and the trust for sale and for payment of an annuity to her would arise. Under those circumstances it is impossible to consider her as tenant for life with power to grant a new lease. To have such power there must be a power to accept a surrender of the old lease without determining her interest, which could not exist in the present case.

Grosvenor Woods, in reply, cited from *Sugden* on Powers (3) the following passage:—"But although a concurrent lease cannot be

(1) Law Rep. 5 Eq. 227. (2) Vol. i. p. 45 b.
(3) 8th Ed. p. 777.

made, yet a surrender may be taken of the old lease and a new one granted. If the new lease be made to the old tenant, an express surrender is of course unnecessary; and it is no objection that the tenant for life obtains an increased rent."

March 7. EARL OF SELBORNE, L.C.:—

The question which we have to decide was submitted for the opinion of the Court under sect. 56 of the *Settled Land Act*, 1882. It is, whether *Maria Hazle*, the widow of a testator named *John Hazle*, who died in 1866, is, under the provisions of that Act, legally able to accept a surrender of a lease of a public-house called the *Walmer Castle*, in *Woodstock Street*, *West Ham*, granted by the testator to a person named *Collins* on the 8th of March, 1859, for thirty-one years, commencing on the 25th of March, 1859, at a rent of £50 per annum; and to grant a new lease of the premises comprised therein for a term of twenty-one years from the 25th of December, 1883, at the increased rent of £85 per annum?

By his will, dated the 20th of June, 1866, the testator devised his freehold interest in this public-house (describing it as then let to *Collins* for a term of which about twenty-four years were then unexpired at the annual rent of £50) to trustees upon trust "to permit and suffer" his wife "to receive and take the rents thereof, for her own absolute use and benefit, during the remainder of the term granted by the said lease, if she should so long live; and in case she should die before the expiration of the term created by such lease," then he gave and devised the said messuage and premises to the children of his brother, *William Hazle*, in fee; and he directed that if his said wife should "happen to live after the expiration of the term created by such lease," then the trustees should sell such freehold public-house, and out of the income of the proceeds thereof pay an annnity of £50 a year to his wife for her life; and hold the proceeds, subject to that annuity, for his brother's children.

If substance and not form is to be regarded this is (in substance) a provision of an annuity of £50 a year for the widow during her life; payable by means of the rents of the public-house (let for exactly that amount per annum) while the lease should

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continue; and afterwards (if she should be still living) out of the income arising from the investment of the proceeds of the sale of the freehold, directed to be then sold.

In form it is a gift of the whole beneficial interest in the rents during the continuance of the lease, if the widow should so long live; and of an equivalent annuity afterwards, if she should survive the expiration of the lease, payable out of the income to arise from the proceeds of the sale to be then made.

The *Settled Land Act*, by sects. 3, 6, 13, 22, and 31, gives large powers of sale, re-investment, and leasing, &c., to tenants for life under settlements, defining by sect. 2 (sub-sect. 5) the "tenant for life" to whom those powers are given as "the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life." The will of this testator is undoubtedly a settlement, the *Walmer Castle* public-house is settled land, and the widow is "entitled to possession" within the meaning of the Act. The widow, however, is not a "tenant for life" within this definition. But she has an estate or interest in the rents of the public-house, as to which the question is, whether it comes within one or more of the several descriptions contained in a later section (sect. 58), by the introductory words of which it is enacted that "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act"—words being added in the latter part of the same section which extend to all such persons the general provisions of the Act relative to tenants for life.

The sub-sections of sect. 58 alleged by the Appellant, the widow, to be descriptive of her estate and interest under the will, are the 4th, 6th, and 9th. But I think that unless sub-sect. 4 is applicable the 6th and 9th are not.

Sub-sect. 4 comprehends every case of "a tenant for years determinable on life, not holding merely under a lease at a rent." I do not think that the Appellant is a tenant "for her own or any other life" determinable on any event if she is not a tenant for years determinable on life.

Is, then, this lady a "tenant for years" of this settled estate, "determinable on life" merely because she is entitled to receive, if she shall so long live, the rents payable by a tenant for years

under an ordinary lease at a rent during the continuance of that tenant's term? Mr. Justice *Pearson* thought she was not; and I am unable to differ from him. I agree with the Appellant's counsel that this is a statute which ought to be expounded in furtherance and not in derogation of the important objects of public policy for which it was passed. But, on the other hand, it ought not to be strained or extended by any indirect and artificial construction, so as to give to particular estates and interests under wills, or other settlements, an operation which would alter their essential conditions and nature, and convert them into something substantially different. In the present case, if the Act does not alter the substance of the interest taken by the widow under the will, and the terms on which she takes it, that interest must absolutely cease so far as any possession or receipt of the rents of the "settled estate" is concerned, on the expiration of the lease of 1859; and that lease is liable to expire, not only by effluxion of time, but in other possible events, such as forfeiture and surrender, if a surrender should be lawfully made and accepted. This (unless the statute has provided against it) would put an end to the "possession" (*i.e.*, the receipt of the rents and profits of the settled land), in respect of which alone the widow claims to be entitled to exercise any of the powers of the Act; and when that possession has ceased, she could no longer, under the 58th section, exercise any of those powers.

The consequence is, that, if she could accept a surrender, she could not (unless aided by sect. 51 of the Act) grant a new lease; though sect. 13, which alone authorizes the acceptance of a surrender by a tenant for life, equally authorizes the grant thereupon of a new lease by the same person. If, on the other hand, the termination of her estate and interest in the "settled land" could be held to be prevented by sect. 51, the immediate consequence of the acceptance of a surrender by her would be to destroy altogether, and render incapable of ever taking effect, the express trust for sale on the expiration of the lease during her life, which is contained in the will; and that without any sale under the Act. I am satisfied that what the 58th section contemplates is an estate independent of, and continuing after, the particular acts to be done in exercise of the powers given by the statute,

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and not an estate measured and limited by the terms of its original creation so as to endure only during a state of things which those acts could bring to an end.

I have considered whether the 51st section of the statute, which is undoubtedly retrospective, and is conceived in extremely large terms, can properly be applied to this case. I think it cannot. I think the object of that section is to strike at and defeat (so far as they might control the powers given by the Act) all provisions, even if contained in existing settlements, which might be in their intention and substance prohibitory, obstructive, or penal, for the purpose of preventing alienations or other acts contemplated by the statute. I do not think it was intended to enlarge or alter the substance of any original limitation of a particular estate (not properly an estate for life) which might be lawfully in force when the statute came into operation, and as to which the author of the settlement had neither contemplated nor in any manner provided against any such acts as those in question, nor indeed could rationally have done so, as the law stood when the settlement was made. These considerations shew the great difficulties which would arise from holding that the Appellant is, under sect. 58, a person entitled to the powers given by the Act to a tenant for life. If the words of the 4th sub-section of sect. 58 clearly applied to such interest, we should, notwithstanding, be obliged to hold that she is such a person. But, in my opinion, the words of sub-sect. 4 do not clearly or aptly apply to such an interest as that of the Appellant. They point to a person entitled to an interest in a term of years created or given for his or her benefit if he or she so long live, and not to an interest given during the tenancy, that is, during the estate of another person. We are of opinion, having regard to the difficulties which would arise from a different conclusion, and to the terms of sub-sect. 4, that the Appellant is not a person, under sect. 58, entitled to the powers of a tenant for life.

I think that the judgment appealed from must be affirmed.

BRETT, M.R., and COTTON, L.J., concurred.

Solicitors: *West, King, Adams, & Co.*

W. P.

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[1882 S. 5845.]

Practice—Costs—Action dismissed for want of Prosecution—4 & 5 *Anne*, *c.* 3, *s.* 23 [*Revised Ed. Statutes, vol. ii., p.* 132]—42 & 43 *Vict. c.* 59, *ss.* 2, 4—*Repeal with Qualification—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1—*Discretion of Judge as to Costs—Appeal.*

The statutable right of a defendant to the costs of an action in the Chancery Division which had been dismissed for want of prosecution was repealed by 42 & 43 Vict. c. 59, which repeals so much of 4 & 5 Anne, c. 3, as gives such costs, and though the practice in accordance with such statutable right, and as regulated by Order XXXIII., rule 10, of the Chancery Consolidation Orders of 1860, was preserved by sect. 4 of 42 & 43 Vict. c. 59, yet Order LXV., rule 1, of the rules of 1883 has changed such practice, so that the costs of a defendant where such action has been dismissed for want of prosecution are now in the discretion of the Judge, and therefore his order as to such costs is by sect. 49 of the *Judicature Act*, 1873, not subject to appeal.

APPEAL of the Defendant *Richard Strong* from the order of Mr. Justice *Pearson* ordering that such action should stand dismissed as against such Defendant without costs.

The action was brought to cancel a lease which it was alleged had been improperly granted contrary to the terms of a building agreement. Before the action had gone to trial the Plaintiff went into liquidation, and trustees in liquidation were appointed. An arrangement was then come to between the trustees and three of the Defendants, by which, on payment of a sum of money to the trustees, it was agreed that all further proceedings should be stayed as against those Defendants. This was carried out by erroneously getting an order of revivor making *E. T. Wilson* and *E. Foreman*, who were the trustees, Plaintiffs, and an order dismissing the original action and the action by revivor against such three Defendants. The Defendant *Richard Strong* then applied by summons to dismiss the action as against him for want of prosecution, with costs against the Plaintiffs *Wilson* and *Foreman*. This summons was adjourned into Court, and on the hearing Mr. Justice *Pearson* made the order now appealed from, by which

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the action was dismissed against the Defendant *Strong*, but without costs.

W. W. Karslake, Q.C., and *Mulligan*, for the Respondents:—

There is a preliminary objection to the hearing of this appeal. By Order LXV., rule 1, of the Rules of the Supreme Court, 1883, costs of all proceedings in the Supreme Court, with certain exceptions which do not apply here, are to be in the discretion of the Court or Judge. It was consequently in the discretion of the learned Judge to give costs or not in this case, and then by sect. 49 of the *Judicature Act*, 1873, the order as to such costs is not to be subject to appeal except by leave of the Judge making the order. It is true that with reference to suits in equity it was enacted by sect. 23 of 4 Anne, c. 16, or in revised edition 4 & 5 Anne, c. 3, that "upon the plaintiff's dismissing his own bill, or the defendant's dismissing the same for want of prosecution, the plaintiff in such suit shall pay to the defendant or defendants his or their full costs," but that enactment was repealed by the *Civil Procedure Acts Repeal Act*, 1879 (42 & 43 Vict. c. 59), and the right to costs is therefore governed by Order LXV. Independently of such express repeal, the Court has been held to have jurisdiction to dismiss a bill in equity without costs: *Lister* v. *Leather* (1) and *Daniel's* Chanc. Practice (2), and it has been decided that the effect of the *Judicature Act*, 1875, and Order LV. of the Rules of Court, 1875 (which order corresponds with Order LXV., rule 1, of the Rules of 1883) has been to repeal previous enactments as to costs: *Garnett* v. *Bradley* (3) and *Ex parte Mercers' Company* (4).

Higgins, Q.C., and *H. B. Buckley*, for the Appellant:—

The learned Judge had no discretion as to the costs. Even though the 23rd section of 4 & 5 Anne, c. 3, was repealed by 42 & 43 Vict. c. 59, that last Act, by sect. 4, enacts that such repeal is not to affect, *inter alia*, "any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired, or duty or liability imposed or incurred, or compensa-

(1) 1 De G. & J. 361.
(2) 6th Ed. p. 1933.
(3) 3 App. Cas. 944.
(4) 10 Ch. D. 481.

tion secured by or under any enactment so repealed." Therefore the practice of the Courts of Equity, by which a defendant always had his costs when a suit was dismissed for want of prosecution, as shewn by Order XXXIII., rule 10, of the General Consolidated Orders of 1860, was preserved. Moreover, the learned Judge did not exercise his discretion as he ought to have done: *Ex parte Isherwood* (1).

BRETT, M.R.:—

I am of opinion that there is no appeal, and that therefore we are prevented from considering whether we would agree with Mr. Justice *Pearson* in not giving the Defendant his costs. After the statute 4 & 5 Anne, c. 3, when an order was made dismissing a suit in equity for want of prosecution, the defendant had a statutable right to his costs, and, if that statute had remained unrepealed, the Judge would have had no power to deprive him of his costs. This statutable right of the defendant remained at the time of the *Judicature Acts*, but it was taken away afterwards by the 42 & 43 Vict. c. 59, which repealed the 23rd section of the 4 & 5 Anne, c. 3. It is true that the 4th section of 42 & 43 Vict. c. 59, says that the repeal effected by that Act shall not affect "any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired, or duty or liability imposed or incurred, or compensation secured, by or under any enactment so repealed." It is very difficult to construe that part of sect. 4. It might be construed, I think, as meaning that, although after that statute a defendant's right to costs where a suit had been dismissed for want of prosecution had ceased to be a statutable right, yet it remained as a rule of practice, that is to say, as a "principle or rule of law;" consequently, until the Rules of the Supreme Court, 1883, the "principle or rule of law" as to such costs remained. But the *Judicature Acts* gave the Judges powers to make rules having a statutable force, and under such power Order LXV., rule 1, was made. Though the Judges had no power to make rules altering any statute, they had power to make rules dealing with any principle of law which affected rules of procedure and practice.

(1) 22 Ch. D. 384.

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It seems to me that the matter is now determined by Order LXV., rule 1, which has altered prior rules of practice as to costs. The present case is within that rule, and the learned Judge therefore had a discretion to deal with the costs of the action, and consequently there can be no appeal as to whether he exercised such discretion rightly.

COTTON, L.J.:—

I am of opinion that sect. 49 of the *Judicature Act*, 1873, prevents us from considering whether the learned Judge was right or not in the order he has made as to costs. Up to a certain time this would not have been the case, because the statute of *Anne* would have deprived the Judge of any discretion as to costs. Now that portion of the statute is repealed, and Order LXV., r. 1, applies, which leaves the costs of all proceedings to the discretion of the Judge, and I cannot construe this rule so as to exclude the costs which are here in question. It has been said that in making this order, by which this Defendant has been deprived of his costs, the learned Judge acted contrary to a well-known principle which has hitherto governed the practice of the Courts. That may be true; but this Order LXV., rule 1, does expressly state that the costs are to be in the discretion of the Judge, and we cannot say that the case is not within sect. 49 of the *Judicature Act*, 1873, which takes away the power of appeal, because we are told that the learned Judge exercised his discretion contrary to what was a well-known previous rule of practice.

LINDLEY, L.J.:—

I also am of opinion that these costs were in the discretion of the Judge, and that therefore this appeal cannot be entertained. How the case would have stood if the statute of *Anne* had remained it is not necessary to say, since that enactment was repealed by 42 & 43 Vict. c. 59, which was intended to assist in clearing the statute book by eliminating useless enactments; but in order to do no more than was necessary for that purpose the 4th section was inserted, by which the repeal was not to affect any

"principle or rule of law or equity established" by the repealed enactment. The costs of the dismissal of a suit in equity for want of prosecution had not only been regulated by the statute of *Anne* but by the Consolidated Chancery Orders of 1860, which had followed the statute, and when the enactment of *Anne* was repealed those orders and the practice under them still remained in force by virtue of the 4th section of 42 & 43 Vict. c. 59. Then the Judges, acting under the powers given them by the *Judicature Acts* in 1883, remodelled the old rules and intentionally substituted this much wider rule of Order LXV., rule 1, for the old one. Subject to some exceptions not material to be now considered the new rule has placed all the costs of proceedings in the Supreme Court, including therefore the costs of dismissal of the action for want of prosecution, in the discretion of the Judge. There is therefore no appeal in the present case.

Solicitors for Appellant: *Taylor & Taylor.*
Solicitor for Respondents: *W. Tanner.*

W. P.

TRUMAN *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

[1882 T. 1328.]

Railway Company—Nuisance—Additional Lands—Cattle Station.

A railway company were by their Act authorized, among other things, to carry cattle, and were also authorized to purchase by agreement (in addition to the lands which they were empowered to purchase compulsorily) any lands not exceeding in the whole fifty acres, in such places as should be deemed eligible, for the purpose of providing additional station yards, &c., for receiving, loading, or keeping any cattle or any goods, &c., conveyed or intended to be conveyed by the railway, and for making convenient ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite; and they were empowered to sell the additional lands, and to purchase in lieu thereof other lands which they should deem more eligible for their additional purposes, and afterwards to sell the same as aforesaid, and so from time to time. The company bought under this power a piece of land adjoining one of their stations and used it as a cattle dock. The noise of the cattle and drovers was a nuisance to the

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occupiers of certain houses near the station, and they brought an action to restrain the company from continuing the nuisance:—

Held (affirming the decision of *North*, J.), that the Plaintiffs were entitled to an injunction, for that there was nothing in the Act which by necessary implication authorized the creation of a nuisance on the additional lands.

THIS was an appeal by the Defendant company from a decision of Mr. Justice *North* (1).

The company, to the undertaking of which the Defendant company had succeeded, had by their Act, 1 Vict. c. cxix. (2)

(1) 25 Ch. D. 423.

(2) The following clauses of the Act were referred to in argument:—

"82. That it shall be lawful for the said company, and they are hereby empowered, to contract with any person or corporation (who shall be willing to sell the same) for the purchase of any lands, not exceeding in the whole fifty statute acres, in addition to the lands hereinbefore authorized to be taken, in such places as shall be deemed eligible, for the purpose of making and providing additional stations, yards, wharfs, waiting, loading, and unloading places, warehouses, and other buildings and conveniences for receiving, depositing, loading or keeping any cattle, or any goods, articles, matters, or things conveyed or intended to be conveyed upon the said railway, or for making convenient roads or ways thereto, or for any other purposes whatsoever connected with the undertaking by this Act authorized, which the said company shall judge requisite." (Then followed words enabling corporations and incapacitated persons to convey.)

"83. That it shall be lawful for the said company to sell and dispose of such additional lands as they are by this Act empowered to purchase, and shall have actually purchased, for the purpose of additional stations, yards, wharfs, waiting, loading, and unloading places, warehouses, and other buildings and conveniences as hereinbefore authorized, or such parts of such lands as the said company shall think proper and in such manner and to such persons as the said company shall think proper, and by deed under their common seal to convey such lands to the purchaser thereof, and again to purchase other lands which the said company shall deem more eligible for the purposes aforesaid, and afterwards to sell and dispose of the same in manner hereinbefore mentioned, and so from time to time as the said company shall deem proper, so that the total number of acres to be purchased and held by the said company for the purposes last hereinbefore mentioned shall not exceed at any one time the number of acres for those purposes expressly specified or allowed in this Act: and in the meantime, and until the said company shall think proper to make such sale, it shall be lawful for the said company to let such lands or any part thereof to any person willing to become the tenant thereof, in such manner and upon such terms as the said company shall think proper."

Sect. 124 empowered and required the company within ten years from the passing of the Act to sell superfluous lands.

"Sect. 127. That unless the said company shall within the space of two

the usual powers of taking for their line and works the necessary portions of the lands laid down in the deposited plans and books of reference. The 82nd section enabled them to contract with any one who should be willing to sell the same for the purchase of any lands not exceeding in the whole fifty acres, in addition to the lands thereinbefore authorized to be taken, in such places as should be deemed eligible for the purpose of making and providing additional station yards, wharfs, waiting, loading and unloading places, warehouses, and other buildings and conveniences for receiving, depositing, loading, or keeping any cattle or any goods, articles, materials, or things conveyed or intended to be conveyed on the said railway, and for making convenient roads or ways thereto, or for any other purposes whatsoever connected with the undertaking which the said company should judge requisite. By the 83rd section the company were authorized to sell and dispose of such additional lands, and again to purchase other lands which they should deem more eligible

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years, to be computed from the passing of this Act, agree for or cause to be valued and paid for as in this Act is mentioned, the lands which they are by this Act empowered to take or use, or otherwise so much thereof as shall be by them deemed necessary and proper for the purpose of making the said railway or other works hereby authorized, save and except the aforesaid fifty acres of land which the said company are by this Act authorized to purchase in addition to the lands hereby authorized to be taken or used for making the said railway and other works, then and from thenceforth the powers which are hereby granted to them for taking or using such lands shall cease and be utterly void, save so far as the same may be exercised with the consent in writing of the owners and occupiers of such lands respectively.

"129. That in case the said railway and works shall not have been made and completed (unless prevented by inevitable accident) within the space of seven years to be computed from the passing of this Act, then from and after the expiration of the said term of seven years all the powers, authorities, and privileges given by this Act shall cease and determine, save only and except as to so much (if any) of the said railway and works as shall be declared and certified to have been completed within the said term by the justices of the peace," &c.

"198. That it shall be lawful for the said company and they are hereby authorized to use locomotive engines and other moving power, and, in carriages drawn or propelled thereby, to convey upon the said railway, and also upon any other railway communicating therewith, all such passengers, cattle, and other animals, goods, wares, and merchandize, articles, matters, and things as shall be offered to them for that purpose" (the rest of the section related to charges for conveyance).

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for their additional purposes, and afterwards to sell and dispose of the same in manner thereinbefore mentioned, and so from time to time as the company should deem proper. Sect. 124 required the company to sell superfluous lands within ten years from the passing of the Act. Sect. 127 deprived the company of the power of compulsory purchase after the end of two years from the passing of the Act. By sect. 129, if the railway was not made in seven years the powers were to cease. By sect. 198 the company were authorized to use locomotive engines, and to convey all such passengers, cattle, and other animals, goods, and things, as should be offered to them for that purpose.

The company, under the powers of the 82nd section, bought in 1851 a piece of land adjoining their *East Croydon* station, and made it into a yard or dock for cattle brought by the railway.

The action was brought by owners and occupiers of houses near this cattle yard to restrain the company from bringing animals thither, or keeping them there in such a manner as to be a nuisance to the Plaintiffs. The question was whether under the powers of the Act the company were authorized to have and use a cattle dock at this place, supposing that it could not be used without creating what, if not authorized by the Act, would be an actionable nuisance. Mr. Justice *North* held that they were not, and granted an injunction as asked. The company appealed, and the appeal was heard on the 30th and 31st of January, 1885.

Rigby, Q.C., and *Ingle Joyce*, for the appeal:—

The question is whether the powers given us by the Act for cnrrying on our business can be exercised only upon lands which the Act defines by metes and bounds. We say that such is not the scope of the Act. It empowers the company to deviate with the consent of the adjoining owners, so that a part of the line might be put upon land which could not be compulsorily taken. We say that the intention was to make lands purchased under sect. 82 an integral part of the company's works, and that whatever we could lawfully do upon lands compulsorily taken we may do upon lands purchased by agreement, and which we could not have taken compulsorily. The scheme was not intended by the

Act to be carried out only on defined lands. We are authorized to carry cattle, and therefore to do what is necessary for that purpose. It is not necessary that we should be compellable to carry them. In *Rex* v. *Pease* (1) the company were not compelled to use locomotives.

[FRY, L.J.:—The company were authorized to use them on a defined strip of land.]

The object of the Act is defeated by the decision appealed from; it is impossible to find land in such a situation that a person may not build a house close to it and complain of a nuisance. Mr. Justice *North* thought himself bound by *Managers of Metropolitan Asylum District* v. *Hill* (2); but to make that case parallel there ought to have been a power to erect a small-pox hospital on particular land with power to take extra land. Moreover, in that case there was not a line in the Act that shewed any intention to interfere with private rights. In Railway Acts the Legislature does intend to interfere with private rights, and to authorize things which if not so authorized would be an actionable nuisance. A cattle trade was contemplated by the Act in the present case, and the cattle docks must be near the stations or they will be of no use; it is not like the case of a small-pox hospital, which might be established anywhere. Where an Act shews an intention to interfere with private rights the question only is, how far? and the case stands on an entirely different footing from one under an Act where no such intention is shewn at all. In the small-pox hospital case there was not even power to purchase a site compulsorily; there was not a word in the Act pointing at interference with private rights. Here the carrying cattle is authorized in the same way as the use of locomotives in *Rex* v. *Pease*. It appears from *Geddis* v. *Proprietors of Bann Reservoir* (3) that if the act is authorized, and there is no negligence, an action will not lie. We are authorized to buy land for loading and unloading cattle, and that land must of necessity be land adjoining the railway; there is therefore a definition of locality. This is the first case in which any distinction has been

(1) 4 B. & Ad. 30. (2) 6 App. Cas. 193.
(3) 3 App. Cas. 430.

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drawn as to the part of a company's property on which the act complained of is done. We say that the Act authorizes what we do, and, whether it provides for compensation or not, there can be no injunction.

Barber, Q.C., and *A. Young*, for the Plaintiffs:—

If the Act had provided compensation for nuisance that would have been a defence, but the company do not rest their case on that; they contend that under sects. 82 and 198 what they do is authorized. The case is governed by *Managers of Metropolitan Asylum District* v. *Hill* (1). The company do not say that what they do is done in discharge of a duty imposed on them, nor do they say that they have express authority to collect cattle in this particular place. They have only a general permissive authority to make cattle yards without reference to any particular spot, and we say that they cannot exercise this power so as to create a nuisance; they are bound to select a site where what they do will not be a nuisance. This principle is laid down by Lord *Watson* in *Managers of Metropolitan Asylum District* v. *Hill*. There is a distinction between the fifty acres and the land which the company can take under their compulsory powers. When Parliament is giving compulsory powers it has before it the question of interference with private rights, and provides for compensation wherever it appears right that compensation should be made, but the case is quite different as to lands which the company can only purchase by consent; as to them the company is in the position of an ordinary purchaser. In the *Metropolitan Asylum Case* there was no compulsory power to purchase, but a power was given to erect hospitals in discharge of a public duty.

[BAGGALLAY, L.J.:—In that case the managers had not in express terms a discretion as to situation. Here the purchased lands were to be "in such places as should be deemed eligible." Does not that make the company judges as to the situation?]

The language in the latter part of the section where the company are intended to be made judges is different. The onus is on the company to justify the nuisance, and they must shew that

(1) 6 App. Cas. 193.

the Act in express terms or by necessary implication authorizes it, as held by Lord *Blackburn* in the *Metropolitan Asylum Case* (1). Here there is no necessary implication, for there is not a single object mentioned in sect. 82 which necessarily involves a nuisance.

The further argument of the case was postponed in order that the Respondents might be furnished with a copy of the Act. The argument was resumed on the 12th of February.

Barber, Q.C.:—I contend that on the construction of the Act the power to purchase by agreement cannot be exercised after the completion of the line. It was the intention of the Legislature that all powers should cease after the line was completed, *i.e.*, after seven years. We say that the power of purchasing under sect. 82 must be exercised before the expiration of seven years: *City of Glasgow Union Railway Company* v. *Caledonian Railway Company* (2); *Sadd* v. *Maldon Railway Company* (3); *Kemp* v. *South Eastern Railway Company* (4). We say that under sect. 124 they are bound to sell all surplus lands in ten years, and that after that they cannot buy fresh lands under sect. 82. If they wanted a fresh station or yard they must go to Parliament for further powers. The Act of 1846 (9 & 10 Vict. c. cclxxxiii.) contains powers to complete unfinished contracts for purchasing lands. That shews that it was not intended that they should have any powers of purchasing fresh lands. We contend, therefore, that the purchase of the land was *ultrà vires*; but if not, the company has no higher rights than a private owner, and cannot commit a nuisance: *Geddis* v. *Proprietors of Bann Reservoir* (5). We say further that the company have been guilty of negligence, for that they might have found another site where a cattle dock would not injure their neighbours.

Rigby, in reply:—

The clauses in the Act which limit the duration of our powers do not apply to purchases under sect. 82, which clearly, as appears from sect. 83, were intended to be exercised from time to time.

(1) 6 App. Cas. 208.
(2) Law Rep. 2 H. L., Sc. 160.
(3) 6 Ex. 143.
(4) Law Rep. 7 Ch. 364.
(5) 3 App. Cas. 430, 455.

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It would be a very extraordinary result if we could carry and keep cattle on any other part of our property, but not at this station, merely because we had purchased the land voluntarily.

1885. Feb. 21. BAGGALLAY, L.J. :—

The Plaintiffs in the action in which this appeal is brought, are the owners, lessees, and occupiers of certain houses situate in *Lansdowne Road, Croydon,* in the county of *Surrey.*

The Defendants, the *London, Brighton, and South Coast Railway Company,* were incorporated by an Act of Parliament passed in the year 1846, and, by virtue of that Act, succeeded to all the powers, privileges, obligations, and liabilities conferred and imposed upon the then previously existing, but thereby dissolved, *London and Brighton Railway Company,* which had been incorporated by an Act passed in the year 1837.

In the year 1851 the Defendants acquired, by purchase from the previous owners thereof, under powers to which I shall have occasion to refer more particularly presently, possession of a plot of land abutting upon *Lansdowne Road* on the side opposite to that on which the Plaintiffs' houses have been since erected. The plot of land, of which possession was so acquired by the Defendants, was situate between *Lansdowne Road* and the land then possessed and used by the Defendants for the ordinary purposes of their *Croydon* station.

In the year 1881 the Defendants commenced to use the plot of land, the possession of which had been so acquired by them in 1851, as a cattle dock or station, and from that time, until the commencement of the action, continued to so use it. In the course of such user they from time to time brought to, and unloaded from, and also loaded at and dispatched from, such dock or station, large quantities of cattle, calves, and sheep, and the cattle, calves, and sheep, so unloaded from and loaded at, the said dock or station were discharged and received by means of communications with *Lansdowne Road.*

By their statement of claim the Plaintiffs alleged that such use by the Defendants of the dock or station occasioned to them and their families great annoyance and discomfort by reason of the noise caused by the arrival and departure of the trains carrying

the cattle, calves, and sheep, and of their bellowing and bleating during their detention at the station, and of the shouts of the drovers attending them; and they claimed an injunction to restrain the Defendants from continuing the alleged nuisance, and an inquiry as to the damages sustained by them in respect thereof.

It is not disputed that the use by the Defendants of the dock has been such as to occasion an actionable nuisance in respect of which the Plaintiffs would be entitled to the injunction claimed, unless the Defendants have in so using the dock acted within their statutory powers.

Mr. Justice *North*, by whom the action was tried, was of opinion that the statutory powers of the Defendants afforded them no protection, and gave judgment for the Plaintiffs; against this judgment the present appeal has been brought.

The Act of 1837 contains a series of clauses, such as were then usually introduced into Acts of Parliament for the incorporation of railway companies, by which the *London and Brighton Railway Company* were authorized to make the railway and works therein mentioned, and to acquire, take, and use for such purpose the lands therein specially referred to. The works so authorized to be made included the landing-places, stations, communications, approaches, and conveniences attached to, connected with, or necessary for the railway. By the 124th section the company were enabled and required, within ten years from the passing of the Act, to sell any superfluous lands acquired by them, in such manner as they should deem most advantageous. By the 127th section the powers of the company to take land by compulsion were to cease at the expiration of two years from the passing of the Act; and, by the 129th section, if the railway and works were not completed within seven years from the passing of the Act, the powers of the company were to cease, except as to such parts thereof as should then be completed. By the 198th section the company were authorized to use locomotive engines and other moving power, and, in carriages drawn or propelled thereby, to convey upon the said railway all such passengers, cattle, and other animals, goods, and merchandize, as should be offered to them for that purpose.

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The provisions of the Act, upon which the Defendants rely as authorizing the use by them, for the purposes of a cattle-dock or station, of the plot of land so acquired by them in 1851, are contained in the 82nd section, which is in the following terms: "It shall be lawful for the said company, and they are hereby empowered, to contract with any person or corporation (who shall be willing to sell the same) for the purchase of any lands, not exceeding in the whole fifty statute acres in addition to the lands hereinbefore authorized to be taken, in such places as shall be deemed eligible, for the purpose of making and providing additional stations, yards, wharfs, waiting, loading, and unloading places, warehouses, and other buildings and conveniences, for receiving, depositing, loading, or keeping any cattle, or any goods, articles, matters, or things, conveyed, or intended to be conveyed, upon the said railway, or for making convenient roads or ways thereto, or for any other purposes whatsoever connected with the undertaking by this Act authorized, which the said company shall judge requisite."

It will be observed that the power thus conferred upon the company of acquiring lands for additional stations, is not limited either as regards locality or time; the 127th section, already referred to as limiting the time for the acquisition of lands for the purposes of the railway, contains an exception in respect of the fifty acres referred to in sect. 82; and by the 83rd section, the company are further authorized to sell lands purchased, but not required, for additional stations, and afterwards to purchase other lands for the same purposes.

It has been urged on behalf of the Plaintiffs that, under the provisions of the 124th and 127th sections already referred to, the powers of the company to acquire land for, and to construct and use, additional stations ceased at the expiration of ten years under the earlier section, if not at the end of seven years under the later, but I do not so read or understand sects. 124 and 127. In my opinion, they have reference only to lands which the company were authorized to take by compulsion, and to powers to be exercised in respect of the works authorized to be executed upon such lands.

Having regard to the sections of the Act of 1837 to which I

have referred, including those which clearly recognised that the ordinary business of the company would include the use of locomotives and the conveyance of cattle, I agree in the opinion expressed by Mr. Justice *North* that the company were acting within their statutory powers when they acquired the plot of land purchased by them in 1851, and when they converted it into a station for the receipt and dispatch of cattle. It remains, however, for consideration whether, in the use of lands acquired by the company for the purposes mentioned in sect. 82, they have the same immunities in respect of nuisances which may be thereby occasioned to the owners of adjoining property, as it has been established, by a series of well-known decisions, that they are entitled to in respect of nuisances which may be occasioned by reason of the construction or use of works which, under the powers conferred upon them by the Legislature, they are authorized to construct upon the lands which they are empowered to take by compulsion; and this is the substantial question which we have to determine upon the present appeal.

The Appellants contend that the question should be answered in the affirmative; in support of this contention, reference has been made to the cases of *Rex* v. *Pease* (1), *Vaughan* v. *Taff Vale Railway Company* (2), and *Hammersmith Railway Company* v. *Brand* (3). In *Rex* v. *Pease* the defendants were authorized to construct their railway parallel and adjacent to an ancient highway, and in some parts within five yards of it, and under their statutory powers had used it for the carriage of coals in waggons drawn by locomotives worked by steam. The locomotives having frightened the horses of the persons using the highway as a carriage road, the defendants were indicted for a nuisance, but it was held that the interference with the rights of the public must be taken to have been contemplated and sanctioned by the Legislature, since the words of the statute authorizing the use of the engines were unqualified. In *Vaughan* v. *Taff Vale Railway Company* a wood belonging to the plaintiff was set on fire by sparks from a locomotive used by the company in the course of their ordinary business; and *Cockburn*, C.J., in the course of his

(1) 4 B. & Ad. 30. (2) 5 H. & N. 679.
(3) Law Rep. 4 H. L. 171.

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judgment, stated the general principle applicable to such cases in the following terms (1):—"When the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible"; and *Crompton*, J., in the same case (2), illustrated the general principle in the following terms:—"*Rex* v. *Pease* (3) shews that although the use of a locomotive engine must have been accounted a nuisance unless authorized by the Legislature, yet, being so authorized, the use of it is lawful, and the defendants are not liable for an accident caused by such use without any negligence on their part."

It will be observed that the general principle thus stated by *Cockburn*, C.J., and which, upon examination, will be found to be the principle upon which all these cases were decided, was based upon the use or doing of a particular thing, for the purpose for which it was authorized to be used or done. The decision in the case of *Hammersmith Railway Company* v. *Brand* (4) involved the same principle, for though the actual decision was that the parties aggrieved were not entitled to compensation, as to which, however, there was a great difference of judicial opinion, the general principle, as stated by *Cockburn*, C.J., was distinctly recognised. That action was brought to recover compensation in respect of injury to a house depreciating its value, caused by vibration, smoke, and noise in running locomotives with trains after the construction of the railway, in the ordinary course of the business of the company. Lord *Cairns*, who dissented from the actual decision, expressed himself upon the general principle as follows (5): "It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken, I think, from the statements in this case, that the railway could not be used for

(1) 5 H. & N. 635.
(2) Ibid. 687.
(3) 4 B. & Ad. 30.
(4) Law Rep. 4 H. L. 171.
(5) Law Rep. 4 H. L. 215.

the purpose for which it was intended without vibration. It is clear to demonstration that the intention of Parliament was, that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought, and had succeeded, the Court of Chancery would interfere by injunction, and would prevent the railway being worked, which, of course, is a *reductio ad absurdum*, and would defeat the intention of the Legislature. I have, therefore, no hesitation in arriving at the conclusion that no action would be maintainable against the railway company."

Now in those three cases we have three illustrations of the principle. In *Rex* v. *Pease* (1) there was the frightening of horses on the public highway by the railway running at the side of it; in the case of *Vaughan* v. *Taff Vale Railway Company* (2) a wood was set on fire and property destroyed by sparks coming from the chimney of the locomotive; and in *Hammersmith Railway Company* v. *Brand* (3) a house belonging to a neighbouring landowner was injured by reason of the vibration and smoke and noise; and in each case it was held, not only that there was no right to restrain the continuance of the nuisance, but that there was no right even to compensation.

The general effect of the decision in *Hammersmith Railway Company* v. *Brand* was thus stated by Lord *Watson* in the case of *Managers of Metropolitan Asylum District* v. *Hill* (4). Lord *Watson* there said: "The judgment of this House in *Hammersmith Railway Company* v. *Brand* determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications, upon a particular site, and for a specific purpose, the use of these works or buildings, in the manner contemplated and sanctioned by the Act, cannot, except in so far as negligent, be restrained by injunction, although such use may constitute a nuisance at common law; and that no

(1) 4 B. & Ad. 30.
(2) 5 H. & N. 679.
(3) Law Rep. 4 H. L. 171.
(4) 6 App. Cas. 211.

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compensation is due in respect of injury to private rights, unless the Act provides for such compensation being made."

The case of *Geddis* v. *Proprietors of Bann Reservoir* (1) was also referred to in the course of the arguments, and it illustrates the general principle that a company having statutory powers may be deprived of the immunities to which they would otherwise be entitled, if they are negligent in the exercise of such powers. In that case the construction of particular works in a particular place and in a defined manner was authorized by an Act of Parliament, and the works were executed in accordance with the provisions of the Act; an action was brought by a landowner who had sustained damage by reason of the construction and use of such works, and the House of Lords held that he was entitled to recover, on the ground that, though the works were authorized, the company had negligently omitted the construction of further works which it was within their power to construct, and which if they had been constructed, would have prevented the occurrence of the damage. The distinction between the case which is the subject of the present appeal, and those to which I have just referred, is this: that the *London and Brighton Railway Company* were not authorized to construct such additional stations as they might deem necessary, on any particular sites or at any particular times, nor were they required or put under any obligation to construct any such additional stations unless they should deem them necessary. The effect of this distinction is, in my opinion, well illustrated by the case of *Managers of Metropolitan Asylum District* v. *Hill* (2), which was decided in the House of Lords in 1881. The appellants (who were the defendants in the action in which the appeal was brought) were incorporated by the *Metropolitan Poor Act*, 1867, for the purpose of providing hospitals for the reception of the sick poor of the metropolis. By the 5th section of the Act it was declared that asylums might be provided under it for the reception and relief of the sick, insane or infirm, or other classes of the poor, chargeable in unions or parishes; by the 6th section the Poor Law Board were authorized to combine parishes or unions into districts, for the purposes of the Act; by sect. 7 it was declared that for each district there should be an

(1) 3 App. Cas. 430. (2) 6 App. Cas. 193.

asylum or asylums as the Poor Law Board should from time to time direct; and, by the 15th section, the Poor Law Board were empowered to direct the managers of the asylums to purchase or hire, or to build and fit up, buildings for the asylum, of such nature and size and according to such plan as the Poor Law Board should think fit. A small-pox hospital was established by the appellants at *Hampstead*, which the respondents, who were, or represented, residents in the neighbourhood, alleged to be a nuisance, and commenced an action to restrain the appellants from continuing to use the hospital as before. The cause came on to be tried before Mr. Baron *Pollock*, and a special jury, on the 18th of November, 1878, when the jury gave the following answers to questions put to them: (1.) and (2.) That the hospital was a nuisance occasioning damage to the plaintiffs, and each of them, *per se*, and also by reason of the patients coming to or going from the hospital. (3.) Upon the assumption that the defendants were by law entitled to erect and carry on an hospital, they did not do so with all proper and reasonable care and skill with reference to the plaintiffs' rights. (4.) Was a like answer as regarded the particular hospital; and (5.) Was to the effect that the defendants did not use proper care and skill with reference to the ambulances. The first and second of these answers affirmed the existence of the nuisance; the other three that there had been a negligent use of such statutory powers as the managers possessed. Thereupon the verdict was entered for the plaintiffs. On further consideration, judgment was entered for the plaintiffs, and an order was made for an injunction restraining the defendants from using the hospital as before. A rule to reverse the judgment or for a new trial having been obtained, an order was made by the Queen's Bench Division dissolving the injunction and granting a new trial; from this order both parties appealed, and from the orders of the Court of Appeal there were further appeals to the House of Lords. Upon the suggestion of the House the question of the right of the appellants in point of law to maintain the hospital in its existing state was first argued. The arguments in support of the appellants' right to maintain the hospital were to the effect that what had been done had been done under statutory authority, and therefore was not the subject of an action at the

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suit of individuals who alleged that they were injured by it; that the appellants were constituted a public body by virtue of a statute, and had duties specially assigned to them which were of a public nature, and which they were required to perform, being thereunto required by the Local Government Board, who were the successors of the Poor Law Board; that they had obeyed the orders of that Board; and that, as everything that had been done had been so done under statutory authority, any private individuals who thereby suffered inconvenience must bear it; and the decisions in *Rex* v. *Pease* (1) and *Hammersmith Railway Company* v. *Brand* (2) were relied upon. On the part of the respondents it was contended that the *Metropolitan Poor Act* had merely declared what was desirable to be done, that there was nothing in the Act to compel the appellants to erect the small-pox hospital in any particular place or in any particular manner, and beyond all nothing to authorize them to do all this in such a manner as to cause a nuisance to the proprietors of neighbouring lands. It was held in the House of Lords, the Lord Chancellor, Lord *Selborne*, and Lords *Blackburn* and *Watson* being present, that the appellants had not the statutory powers on which they relied. Lord *Selborne*, after stating that it must be assumed for the then present purpose that the small-pox hospital which the appellants had established at *Hampstead* was, in its actual position and independently of the particular way in which it was conducted, necessarily a nuisance to the neighbours, and that in order for the appellants to succeed in their appeal they must prove that they had statutory authority to create a nuisance for the purpose of and as incidental to the maintenance of a small-pox hospital in this place, and after referring to the provisions of the Act of Parliament proceeded as follows (3): "The result is, (1.) That this Act does not necessarily require anything to be done under it which might not be done without causing a nuisance; (2.) That as to those things which may or may not be done under it, there is no evidence on the face of the Act that the Legislature supposed it to be impossible for any of them to be done (if they were done at

(1) 4 B. & Ad. 30. (2) Law Rep. 4 H. L. 171.
(3) 6 App. Cas. 201.

all) somewhere and under some circumstances, without creating a nuisance; and (3.) That the Legislature has manifested no intention that any of these optional powers, as to asylums, should be exercised at the expense of, or so as to interfere with, any man's private rights. The only sense in which the Legislature can be properly said to have authorized these things to be done is, that it has enabled the Poor Law Board to order, and the managers to do them, if, and when, and where, they can obtain by free bargain and contract the means of doing so. If the Legislature had authorized some compulsory interference with private rights of property, within local limits which it might have thought fit to define, for the purpose of establishing this asylum to be used for the reception of patients suffering from small-pox or other infectious disorders, and had provided for compensation to those who might be thereby injuriously affected (in such cases and under such conditions as it might have prescribed), the present case might have been like *Rex* v. *Pease* (1) and the *Hammersmith Railway Company* v. *Brand* (2). No person outside the statutory line of compensation, even if the use of the asylum in the manner authorized by the statute had been productive of serious damage to him, could then have obtained any relief or remedy upon the footing that what the statute authorized was a legal nuisance to himself, or, in itself an actionable wrong. But the case is different, when (as here) no interference at all with any private rights is authorized, and no place, or limit of space, is defined within which the establishment of such an asylum is made lawful. Neither the Poor Law Board nor the managers could for this purpose have taken a single foot of ground, or have interfered with any, the most insignificant, easement against the will of the plaintiffs, or of any other person to whom such land or easement might belong. No line is here drawn by the Legislature between interests which are, and interests which are not, proper subjects for compensation. Under these circumstances, I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the plaintiffs without their consent. I therefore move your Lordships to affirm the

(1) 4 B. & Ad. 30. (2) Law Rep. 4 H. L. 171.

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judgment of the Court below, and dismiss this appeal." Lord *Blackburn* says (1): "I think that the case of *Hammersmith Railway Company* v. *Brand* (2) in your Lordships' House, settles, beyond controversy, that where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the Legislature, would entitle any one to an action, the right of action is taken away. It is enough to say that such was the unanimous decision of this house; but the reason briefly given by Lord *Cairns* (3) seems indisputable. 'It is a *reductio ad absurdum* to suppose it left in the power of the person who had the cause of complaint, to obtain an injunction, and so prevent the doing of that which the Legislature intended to be done at all events.'" And again (4): "In the *Metropolitan Poor Act*, 1867, there are provisions, sects. 15, 16, 17, 18, 21, 28, putting everything under the control of the Poor Law Board, and thus affording a considerable, and probably a sufficient, security that any asylum made under that Act should be a well-regulated asylum, and should not be made in any place unless the Poor Law Board thought it a fit place. But the question, as I think, is whether there is an intention shewn on the part of the Legislature, to authorize the erection of an asylum where it is a nuisance to owners of the adjoining property, if the Poor Law Board thought it a fit place, either mistakenly thinking the asylum would be no nuisance there, or, perhaps rightly, thinking that there was no other place in which it could be erected without being a greater nuisance than if erected there. It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears." Lord *Watson* says (5): "The respondents did not dispute that if the appellants or the Local Government Board had been, by the *Metropolitan Poor Act*, 1867, expressly empowered to build the identical hospital which they have erected at *Hampstead*, upon the very site which it now occupies, and that with a view to its being used for the treatment

(1) 6 App. Cas. 203.
(2) Law Rep. 4 H. L. 171.
(3) Law Rep. 4 H. L. 215.
(4) 6 App. Cas. 208.
(5) 6 App. Cas. 212.

of patients suffering from small-pox, the respondents would not be entitled to the judgment which they have obtained. The appellants do not assert that express power or authority to that effect has been given by the Act either to themselves or to the Board; but they contend that, having regard to the nature of the public duties laid upon them, and the necessities of the case, it must, on a fair construction of the Act, be held that the Legislature did intend them to exercise, and authorize them to exercise, such power and authority under the direction and control of the Poor Law Board. I see no reason to doubt that, wherever it can be shewn to be matter of plain and necessary implication from the language of a statute, that the Legislature did intend to confer the specific powers above referred to, the result in law will be precisely the same as if those powers had been given in express terms. And I am disposed to hold that if the Legislature, without specifying either plan or site, were to prescribe by statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided that it were either apparent or proved to the satisfaction of the Court that the directions of the Act could not be complied with at all, without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed. On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result." For the purposes of our decision, I am unable to distinguish the circumstances of the present case from those which were proved, or assumed, to have existed in the case to which I have just referred, and I am consequently of opinion that the appeal must be dismissed, and of course with costs.

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BOWEN, L.J.:—

I think that this case must be decided by the application to the facts of one or two principles which are not at all new and which have been recognised in various decisions of authority. There is no question but that the act of which the Plaintiffs here complain, is an act which, unless it is justified by the authority of Parliament, is an interference with private rights. The onus of proof lies on those who seek to interfere with private rights to shew that they have the express or implied authority of Parliament for doing so. Obviously then the question in each case turns on the construction of the Act of Parliament. An Act of Parliament may authorize a nuisance, and if it does so then the nuisance which it authorizes may be lawfully committed. But the authority given by the Act may be an authority which falls short of authorizing a nuisance. It may be an authority to do certain works provided that they can be done without causing a nuisance, and whether the authority falls within that category is again a question of construction. Again the authority given by Parliament may be to carry out the works without a nuisance, if they can be so carried out, but in the last resort to authorize a nuisance if it is necessary for the construction of the works.

Now it seems to me that the language of Lord *Blackburn* in the case of *Geddis* v. *Proprietors of Bann Reservoir* (1) lays down, or rather sums up, the principles which ought to be applied to a case like this. "I take it," he says, "without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized if it be done negligently. And I think that if by a reasonable exercise of the powers either given by statute to the promoters, or which they have at Common Law, the damage could be prevented, it is, within this rule, negligence not to make such reasonable use of their powers."

Now, the authority of the railway company in the present case being an authority which is to be gathered by implication from the Act, we must scrutinize the Act narrowly to see whether it

(1) 3 App. Cas. 430, 455.

was intended to give an authority in such wide terms as to entitle the company to interfere with private rights whether they could avoid doing so or no. If there is nothing in the Act which shews that so large an authority was intended to be conferred, then it is a simple question of fact whether the company have done all that they could do to avoid interfering with private rights. In construing Railway Acts I do not think that we should be entitled to lay down a hard and fast line of distinction between the way in which companies may exercise their powers upon lands taken by compulsion, and the way in which they may exercise them upon lands taken by agreement. It seems to me that in this very case by sect. 82 the intention of the Legislature was as fully expressed that the company should carry out on the fifty acres of land to be purchased, the objects for which such land was authorized to be purchased, as that it should carry out its general objects on the lands which it was empowered to take compulsorily. It is true that the absence of all intention to interfere with private rights in an Act of Parliament puts an end to all controversy as to the right to commit a nuisance, and in the case of *Managers of Metropolitan Asylum District* v. *Hill* (1) there was not to be found in the Act any element of compulsion or any indication of an intention to interfere with private rights. I do not however think that the absence of one particular indication of an intention to interfere with private rights, or the presence of any one indication of such an intention, is necessarily decisive.

We have in this particular Act first of all a rigid definition of the locality where the principal works of the railway company are to be carried on, namely, the lands on the deposited plans which the company are authorized to take compulsorily. The company were authorized to carry out the objects of the Act, but it was their duty to do so, if possible, in such a way as not to interfere with private rights. Their being confined within a narrow area made it more difficult for them to effect their objects without such an interference, but still the principle which has been embodied in the cases to which Lord Justice *Baggallay* has referred remains, that in every case the railway company can only

(1) 6 App. Cas. 193.

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interfere with private rights if it cannot carry out the objects of the enterprise without doing so.

Now compare with that the case where the company has power to take additional lands, as here under sect. 82. Instead of a rigid definition of the locality within which everything would have to be done, we find a flexible machinery superadded for acquiring lands whose site is not so definitely determined. It is obvious that this gives the company a much greater chance of avoiding interference with private rights than if they were confined to a particular spot, because they can wander further afield. If they find that by planting a station here they are doing a mischief to one of the subjects of Her Majesty, and that by planting it a little further on they can avoid doing the mischief, the flexibility of the machinery ought to be utilized by them for the purpose of avoiding interference with private rights. It is not, therefore, on the distinction suggested in the argument between lands taken by compulsion and those taken by agreement, that I base my judgment, but rather on the fact that the company, having flexible machinery which was intended to be used so as to avoid if possible mischief to individuals, have not used it so as to avoid such mischief. I think that, as the learned Judge pointed out below, it is not shewn that the railway company could not have selected some other field, under the powers of purchase contained in the 82nd and subsequent sections, in such a situation that the objects of the Act could have been carried out there without creating a nuisance, and on that ground I agree with his decision.

FRY, L.J. :—

The learned Judge in the present case has found as a matter of fact that there is sufficient noise of cattle on the premises of the company to cause serious annoyance and disturbance to the Plaintiffs, and materially to interfere with the ordinary use and enjoyment of their houses and the comfort of the inhabitants, and that there has been a great and serious increase of such discomfort since the new cattle dock was made, and he came therefore to the conclusion that there was what would, if the Defendants were

private individuals without statutory powers, clearly be an actionable nuisance. That finding of the learned Judge has not been put in controversy in the present appeal. The Defendants allege that they are authorized by the statute under which they are acting—a statute passed in the year 1837—to create this nuisance. The Respondents, the Plaintiffs, reply that the statute gives no such authority, and they have further added an argument which was, I think, not raised before the learned Judge in the Court below, to the effect that the statutory power of taking the land had expired in the year 1847 at the end of ten years from the passing of the Act, and that this land was not purchased until 1851.

Two questions therefore upon the statute are raised before us. The first is whether the company had the power to purchase this land in 1851, and the second is whether the company, supposing they had that authority, had authority also to create a nuisance upon the land.

Now I will take the first of these questions, and shortly consider the effect of the Act. The 4th section points out that certain plans and sections had been approved of by Parliament, and that it is according to those that the railway was authorized to be constructed. The 12th section gives power to the company to take the lands requisite for that purpose, and although the lands were not absolutely defined, because there are certain powers of deviation, and although the works were not absolutely defined, because certain discretions were left in the railway company, yet, roughly speaking, both the lands upon which the railway was to be constructed, and the nature of the works to be executed by the railway company, were defined with regard to the works originally in the contemplation of the company and of the Legislature. Then sect. 82 confers a power on the company to contract with any person who might be willing to sell them land not exceeding in the whole fifty acres in addition to the lands thereinbefore authorized to be taken. Now it will be observed that no limitation in point of time is imposed by that section with regard to the taking of that land: and then the 83rd section authorizes the company to sell and dispose of such additional lands which

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they are authorized to take, and again, to purchase other lands "which the company shall deem more eligible for their additional purposes, and afterwards to sell and dispose of the same in manner hereinbefore mentioned, and so from time to time as the company shall deem proper." Then there follows a provision as to purchases from incapacitated persons which it is not material to consider. The 124th section requires the company within ten years from the passing of the Act to sell and convey any superfluous lands of which they may be then possessed, and the 127th section declares that unless the company shall within two years from the passing of the Act agree or cause to be valued and paid for all the lands which they are empowered to take or use, except the fifty acres which are expressly excepted, they shall not subsequently take them unless by the consent in writing of the owner or occupiers of such land respectively. The 129th section enacts that the railway is to be made in seven years, or to put it more exactly, in case the railway shall not be made and completed within the seven years then the powers are to cease. Therefore, we have three periods fixed. We have the two years within which the company may compulsorily take what I call the specified land, and for what I call the specified purposes. There are seven years within which those specified works may be constructed upon the specified lands, and at the end of the seven years it appears to me that whatever margin of uncertainty the Act might have allowed with regard either to the lands to be so taken or the works to be constructed upon them, had then come to an end, and everything then must be reduced to certainty. But there remained the power given by the 82nd and 83rd sections to buy from time to time.

It appears to me that that power remains capable of being exercised from time to time, and that it was not put an end to by the lapse of the ten years when the superfluous lands were to be sold. I regard those superfluous lands as meaning such specified lands as, having been taken under the powers previously given, were not required for the specified purposes of the company. Those had to be sold, but the obligation to sell those superfluous lands did not in my opinion limit the power of the company to

subsequently purchase lands under the 82nd section, or from time to time to sell and repurchase under the 83rd section. I think, therefore, that this contention of the Plaintiffs fails.

There remains the more important inquiry, which occupied the greater space of time both in the Court below and here, namely, whether if the company took the lands as additional lands they were authorized upon them to create the nuisance in question. I must observe upon a point which has been raised on the 127th section. The particular lands in question were among the specified lands which might have been taken compulsorily by the company during the two years, and, as I have already observed, the 127th section enlarges the time for the company taking the specified lands beyond the two years provided they be taken with the consent in writing of the owners or occupiers of the lands respectively. It is contended that as these lands were specified lands, and were subsequently taken by the consent of the owner, there is the same right to create a nuisance upon them as there would have been if they had been taken compulsorily or taken by consent during the two years. In my opinion that argument cannot prevail. I think that after the seven years had expired the power of the company to take the specified lands for the originally specified purposes of the Act came to an end, and after that if they took any of the specified lands they could only take them as additional lands and for the purposes for which they were authorized to take additional lands.

I think, therefore, that we are driven to consider the effect of the 82nd section. Now that section enacts that "it shall be lawful for the said company to contract with any person or corporation (who shall be willing to sell the same) for the purchase of any lands not exceeding in the whole fifty statute acres, in addition to the lands hereinbefore authorized to be taken, in such places as shall be deemed eligible," which I read to mean as the company shall deem eligible, "for the purpose of making and providing additional stations, yards, wharfs, waiting, loading and unloading places, warehouses, and other buildings, and conveniences for receiving, depositing, and loading or keeping any cattle, or any goods, articles, matters, or things conveyed or intended to be conveyed upon the said railway, or for making

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convenient roads or ways thereto, or for any other purposes whatsoever connected with the undertaking by this Act authorized which the said company shall judge requisite." It is impossible to conceive a larger enumeration of purposes to which the additional lands might be applied.

Now, as I have already pointed out, not merely may the company thus purchase lands which they may deem eligible, but they may from time to time sell these lands and purchase other lands which they may deem more eligible for the purpose. They have therefore an original power of choice, and they have a continuing power of choice, and if lands purchased for one purpose should cease to be eligible they have the power to purchase other land which they may deem to be more eligible.

That being the nature of the enactment, the inquiry is this, does the Act confer upon the railway company the power to create upon the lands what at common law would be a nuisance? Has it by necessary implication (for there are no express words to that effect) taken away the common law right of neighbours to prevent a nuisance being created on the land? I am bound to say that I can find in these clauses nothing whatever to create such a necessary implication, and when I have said that I perhaps have said all that I ought to say, because, after saying that one cannot find a thing, it is not generally of much use to go on to explain why one cannot find it. At the same time the statute offers opportunities for making one or two observations. In the first place it is to be observed that, among the purposes enumerated in sect. 82 for which the lands are to be taken, there is not one which necessarily would cause a nuisance. In the next place it is plain that no particular land is dedicated to any particular purpose. Again, as I have already observed, the company are to purchase the land in such places as shall be deemed eligible. Now it appears to me that, in considering whether the place be eligible for a particular purpose, the neighbourhood is one of the circumstances which a reasonable person or a reasonable company is bound to take into consideration. The question whether the doing of a particular work on a particular piece of land will create a nuisance, is one of those things which it seems to me the company ought to consider in determining upon the eligibility

of the particular land for that particular purpose. Further, as I have already observed, if the land proves not to be eligible, they have power from time to time, when they think right, to sell that land and to purchase other land which they deem more eligible for that purpose. And, lastly, the statute provides no compensation for any person injured by the creation of a nuisance upon this land.

I am not by any means suggesting that the presence of any one of these circumstances, the absence of which I have noticed, would necessarily imply an authority to create a nuisance, but I think that the absence of all of them is most material. I therefore come to the conclusion that the learned Judge was perfectly right in holding that the statute has not conferred upon the railway company any authority to injure their neighbours, and that therefore they are subject to the common law obligation of not carrying on upon their own land that which shall be a nuisance to their neighbours. The appeal, therefore, in my opinion must be dismissed, and with costs.

Solicitor for Plaintiffs: *John Holmes.*
Solicitors for Company: *Norton, Rose, & Co.*

H. C. J.

BALLARD *v.* TOMLINSON.

[1882 B. 5588.]

Underground Water—Pollution of Well—Nuisance—Injunction.

No one has a right to use his own land in such a way as to be a nuisance to his neighbour, and therefore if a man puts filth or poisonous matter on his land, he must take care that it does not escape so as to poison water which his neighbour has a right to use, although his neighbour may have no property in such water at the time it is fouled.

The Plaintiff and Defendant were adjoining landowners, and had each a deep well on his own land, the Plaintiff's land being at a lower level than the Defendant's. The Defendant turned sewage from his house into his well, and thus polluted the water that percolated underground from the Defendant's to the Plaintiff's land, and consequently the water which came into the Plaintiff's well from such percolating water when he used

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his well by pumping, came adulterated with the sewage from the Defendant's well:—

Held (reversing the decision of Mr. Justice *Pearson*), that the Plaintiff had a right of action against the Defendant for so polluting the source of supply, although until the Plaintiff had appropriated it, he had no property in the percolating water under his land, and although he appropriated such water by the artificial means of pumping.

THIS was an appeal from the judgment of Mr. Justice *Pearson* (1).

The action was for an injunction to restrain the Defendants from permitting a well of Defendant *Tomlinson* to be so used as to pollute the water in or coming into the Plaintiff's well; also for damages for injury by reason of Plaintiff's well and the source of supply thereto having been polluted by the drainage and sewage from Defendants' premises.

The Plaintiff was a brewer at *Brentford*, in *Middlesex*, and the owner of land and premises there, where he and his predecessors had for years carried on the business of brewers. From 1849 until a few years before 1882, when this action was commenced, the water used for the purpose of the brewery was drawn from a deep well upon the brewery premises. This well was an artesian one, sunk through the *London* clay, and the sand immediately below, into the chalk stratum to a depth of about 300 feet below the surface. Both the sand and the chalk were water-bearing strata, from which the water found its way by natural pressure into the well, and from thence was pumped up for the use of the Plaintiff's brewery.

The Defendant *Tomlinson* was the owner of land and premises adjoining the Plaintiff's, and only separated from the brewery by a public highway. A few years before this action, the Defendant *Tomlinson* erected a printing-house on his premises, which he let to the other Defendant *Jackson* who occupied it for his business of printing. There was a deep well also on the Defendants' land going down to about the same depth as the Plaintiff's well, the distance between the two being about ninety-nine yards. The level of the surface of the ground at the Defendants' well was about ten feet higher than that at the Plaintiff's well. The

(1) 26 Ch. D. 194.

Defendants' well had formerly supplied water to a distillery which had once been carried on at the Defendants' premises, but the distillery had been discontinued in 1874, when the Defendant *Tomlinson* constructed a drain from a water-closet attached to the printing-house, by means of which the sewage of the closet and the refuse of the printing-house found its way into the Defendants' well. The two wells had a common source of supply of water, which percolated underground from the Defendants' land to that of the Plaintiff, and there was evidence that the sewage and refuse which so came into the Defendants' well polluted such common source of supply to such an extent that the Plaintiff was unable to use the water from his well for brewing purposes, and that he had thereby sustained damage.

Mr. Justice *Pearson* held that as the Plaintiff had no property in the underground water which came from the Defendants' land, he had no cause of action against the Defendants for polluting such water, and he therefore dismissed the Plaintiff's action.

The Plaintiff appealed.

Cookson, Q.C., and *Webster*, Q.C., (*De Castro* with them), for the Plaintiff:—

The judgment of Mr. Justice *Pearson* cannot be supported. It is mainly founded upon the proposition that the Plaintiff had no property in the water which percolated through the soil into his well, and had therefore no cause of action for the pollution of this water. But assuming that the Defendants have a right if they wish to intercept and appropriate the whole of this water, they are not justified in discharging it into the Plaintiff's well in an impure condition. They are entitled to use their land in a natural manner, as in *Acton* v. *Blundell* (1) and *Chasemore* v. *Richards* (2). But to discharge sewage through the water-bearing strata under their well by means of an artificial process is not a natural use of their land, and if it does injury to their neighbour, they are responsible. The Defendants are not merely fouling water of which they have taken possession, but have constructed a work the effect of which is to contaminate the whole stratum of

(1) 12 M. & W. 324. (2) 7 H. L. C. 349.

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water beneath their well. *Hodgkinson* v. *Ennor* (1) is in point. There the defendant was held liable for the pollution of underground water which flowed through a fissure into a watercourse belonging to the plaintiff. It will be said that the water so polluted was flowing in a defined channel. There is nothing in the judgments as reported to shew that this circumstance was regarded as material, but if it were, the stratum of water in the present case is as much a defined channel as the "swallet" in *Hodgkinson* v. *Ennor*. *Rylands* v. *Fletcher* (2) is wholly in the Plaintiff's favour, shewing that it is the Defendants' duty to prevent anything escaping from their artificial construction which may injure the Plaintiff. *Broder* v. *Saillard* (3), *Hurdman* v. *North Eastern Railway Company* (4), and *West Cumberland Iron and Steel Company* v. *Kenyon* (5) are cases which illustrate the distinction between a nuisance from an artificial work and any detriment from the ordinary use by a neighbour of his land. The decision of Mr. Justice *Pearson* in the present case has been doubted in *Snow* v. *Whitehead* (6). As to the argument that the Plaintiff brings the polluted water into his well by extraordinary pumping, the judgment of *Bramwell*, B., in *Whaley* v. *Laing* (7) shews that where the right to the water exists, it can make no difference whether it is taken up by pumping or in a bucket.

[They also cited *Smith* v. *Kenrick* (8); *Baird* v. *Williamson* (9); *Womersley* v. *Church* (10); *Angell* on the Law of Watercourses (11).]

Sir *F. Herschell*, S.G., and *Vaughan Hawkins* (*Warmington*, Q.C., with them), for the Defendants:—

The Plaintiff has no case: first, because the Defendants do not pollute any water in which the Plaintiff has any property; and secondly, because the act complained of is done by the Defendants on their own land, as they had a right to do, and nothing obnoxious would have passed to the Plaintiff's well but for the act

(1) 4 B. & S. 229; 32 L. J. (Q.B.) 231.
(2) Law Rep. 3 H. L. 330.
(3) 2 Ch. D. 692.
(4) 3 C. P. D. 168.
(5) 6 Ch. D. 773; 11 Ch. D. 782.
(6) 27 Ch. D. 588.
(7) 2 H. & N. 476; 3 H. & N. 675.
(8) 7 C. B. 515.
(9) 15 C. B. (N.S.) 376.
(10) 17 L. T. (N.S.) 190.
(11) 6th Ed. p. 183.

of the Plaintiff himself. As the water percolates underground and does not flow in a defined channel no one has any property in it: *Chasemore* v. *Richards* (1). After it had got on the Plaintiff's land the Defendants might have pumped it back again, and indeed the Defendants might have pumped all the water from the Plaintiff's land so as to make his well dry without giving the Plaintiff thereby any cause of action. On what principle, then, can the Plaintiff say he has a cause of action in respect of the water not being pure when it comes on his land. Nothing is done to the water by the Defendants after it has left their land, nor is it by any artificial use of their land, as by building a reservoir and collecting water there, that the Defendants have done any injury to the Plaintiff. The sinking an artesian well and pumping the water up in the way the Plaintiff has done is not the natural user of land, and he has no right to complain if by so doing he has got foul water from the Defendants' land. The case of *Rylands* v. *Fletcher* (2) and the analogy which is there drawn to a person who keeps a wild and dangerous animal on his land does not apply, for but for the act of pumping done by the plaintiff the animal would have remained in its cage and done no injury to the plaintiff. In the case of *Womersley* v. *Church* (3), on which the Plaintiff so much relies, and which is the only one which approaches in resemblance to the present case, the foul water found its way into the well of an adjoining landowner by the natural force of gravity and not by pumping or the use of any artificial means. The difference between a right to water running in a defined channel and to underground percolating water is pointed out by Lord *Cranworth* in *Chasemore* v. *Richards*, so that such percolating water cannot receive that protection from being fouled which water flowing in a definite channel is entitled to.

Cookson, in reply.

BRETT, M.R.:—

As the proposition of law which is raised by this case seems to all of us clear, we think it right to give judgment at once.

(1) 7 H. L. C. 349. (2) Law Rep. 3 H. L. 330.
(3) 17 L. T. (N.S.) 190.

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The Defendant *Tomlinson* was possessed of a well upon his own property, which at one time he used merely as a well, but afterwards in a manner inconsistent with its being merely a well, as he allowed the sewage arising from the use of his buildings to go into the shaft of such well. Now it seems to me that the shaft of that well is an artificial thing; and that the Defendants therefore collected a quantity of sewage into an artificial reservoir. The Plaintiff, at a considerable distance from this well (the distance to my mind is wholly immaterial) has a well on his own property of considerable depth, which is lower than the bottom of this artificial shaft or well of the Defendants. The collected sewage in the artificial shaft on the Defendants' property has gone through the sides or bottom of this well into what is called the percolating water below the Defendants' land. It is said on behalf of the Defendants that but for the mode in which the Plaintiff uses his well by pumping, the sewage in the artificial shaft on the Defendants' property would not have gone into the percolating water beneath his land, or if it had, it would have remained on his land, or at all events, it never would have gone into the Plaintiff's well. In the result, when the Plaintiff used his own well by means of the mechanical pump it is clear that the water which then came into his well from the percolating water beneath his own land came there adulterated by the sewage which had been in the artificial shaft in the Defendants' well.

Then arises the question whether the Plaintiff under the circumstances can maintain an action against the Defendants? Now what are the rights of the parties? It seems to my mind to be clear from the decisions that no one has at any time any property in water percolating below the surface of the earth, even when it is under his own land, but it is equally clear that everybody has a right to appropriate that percolating water, at least whilst it is under his own land, to the extent that he may take it all so as to prevent any of it going on the land of his neighbour. But his neighbour below him according to the flow of water, has an equal right before the person above has appropriated it to take it all. He has a right to take the water from the percolating stream under his own land to this extent, that he may thereby cause the water which is under the land above him to come on his own land

when it otherwise would not, and then to take that, and so on, until he has absolutely dried the land above him. This percolating water below the surface of the earth is therefore a common reservoir or source in which nobody has any property, but of which everybody has, as far as he can, the right of appropriating the whole.

Then arises the question; has any one of those who have an unlimited right of appropriation a right to contaminate that common reservoir or source, as against those who have an equal right with him to appropriate when he does not, or is he bound not to do anything which will prevent anybody to whom that unlimited right of appropriation shall come to have such water unaltered in quality? Now it has been said by the Solicitor-General in his clear argument that when the Defendants pollute this common source under their own land, they do not pollute any water in which the Plaintiff has any property. That is quite true. The Plaintiff has no property in that water whilst it is under the Defendants' land, nor indeed whilst it is under his own land; and if all that could be said was that that common source was contaminated before the Plaintiff had appropriated any part of it, the Plaintiff could not, to my mind, maintain any action in respect of that contamination. Suppose a man had tapped this common source some distance off his own land for the purpose of experiment and found it was contaminated before it would come under his own land. I think under those circumstances he could not maintain an action, because he had not appropriated the water, and therefore no injury was done to him at that time. But it does not seem to me to follow from that that he cannot maintain an action when water which he has appropriated has been contaminated by something which another person has done to that common source. In other words, it seems to me that although nobody has any property in the common source, yet everybody has a right to appropriate it, and to appropriate it in its natural state, and no one of those who have a right to appropriate it has a right to contaminate that source so as to prevent his neighbour from having the full value of his right of appropriation.

Then the next point taken by the Solicitor-General was this.

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Assuming it to be true that there is such right to appropriate, yet, if the person who has such right only appropriates by artificial means, and does so to such an extent that if he did not use those artificial means the water he would take would not be contaminated, then the polluted water must be said to be appropriated by him in that state by his own act and therefore he cannot maintain the action. I cannot think that is a true proposition. The principle of natural user does not apply at all. The Plaintiff, if he has a right to use anything in nature, has a right to exercise that user by all the skill and invention of which man is capable, and it seems to me that as long as the Plaintiff uses only lawful means as against his neighbour, however ingenious or however artificial those means may be, his right to appropriate the common source is not diminished, because he uses the most artificial or the most ingenious methods. Therefore, however he may appropriate the water from the common source by the use of such artificial means he has a right to have that common source uncontaminated by any act of any other person. Neither does it matter whether the parties are or not contiguous neighbours. If it can be shewn in fact that the Defendants have adulterated or fouled the common source, it signifies not how far the Plaintiff's land is from their land.

The nearest case to the present I take to be the case of *Womersley* v. *Church* (1). I think that that case does shew that the first proposition of the Solicitor-General is wrong, but I do not think that it governs the second point taken by him. I think that the second point is partly noticed in the case of *Whaley* v. *Laing* (2), but it does not in my opinion want any authority. I disagree with the decision of Mr. Justice *Pearson* on this ground, that although nobody has any property in the percolating water, yet such water is a common source which everybody has a right to appropriate, and that therefore no one is justified in injuring the right of appropriation which everybody else has.

COTTON, L.J.:—

I also am of opinion that the decision appealed from is erroneous. As I understand the judgment of Mr. Justice *Pearson* on

(1) 17 L. T. (N.S.) 190.

(2) 2 H. & N. 476; 3 H. & N. 675.

the first point, namely, that this was underground water in an indefinite channel, he thought that his decision was a necessary consequence of *Chasemore* v. *Richards* (1). Now *Chasemore* v. *Richards* simply decided this, as I understand it, that every man has a right to take all the underground water (by which I mean water going in no definite channel) which he can find in his own land, notwithstanding that the effect of his doing so may be that his neighbour will have no underground water in his own land, or that the stream which he owns will be diminished in consequence of the underground water which had been so appropriated not coming into that stream. That in no way decides the present case.

Let us consider what the underground water here is. Such water, whether in the chalk or other strata, is a natural incident of the land which the man has who owns the surface, unless he has parted with the minerals below. According to the decision in *Chasemore* v. *Richards* the owner of the land has as a natural incident to his ownership, a right to avail himself of that incident to whatever extent he chooses, even though the consequence may be that he takes not only the water which at first was under his property, but all the adjoining water which by natural force comes under his land, when he has taken that which was there in the first instance.

But, here, what is it the Defendants are doing? They are not using that natural right; they are not taking the water, but they are putting upon their land filth, which gets down into the underground water in the water-bearing stratum, which is partly under their land and partly under that of their neighbour. They are therefore in no way exercising that right which a person who draws the water under his own land is exercising. All that the House of Lords decided was, that a plaintiff could not complain of a defendant exercising that natural right in taking the water which for the time being was under his own soil. But here the Defendants are not doing that, but are simply putting filth on their own land in such a way as that it gets into the underground water in the stratum common to themselves and other persons. In my opinion, therefore, it is no necessary consequence

(1) 7 H. L. C. 349.

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of *Chasemore* v. *Richards* (1) to say that here the Plaintiff cannot complain of the act of the Defendants.

Then why has not the Plaintiff a right of action? The Defendants, not by exercising a natural right incident to the ownership of land, but by putting filth on their land, interfere with the exercise by the Plaintiff of a natural right incident to the ownership of his own land, and although while dirty water is in the stratum under the Defendants' land, or even, perhaps, while it is under the Plaintiff's land, so long as he is not desiring to appropriate and use it, the Plaintiff has no right of action, yet as soon as the act of the Defendants interferes with the beneficial use by the Plaintiff of that right, incident to the ownership of the land, in my opinion he has a right of action. Of course if what the Defendants were doing was a natural use of their land—that is to say, an exercise of a natural right incident to ownership—the Plaintiff could not complain. But the Defendants are not doing that. No one can say that putting filth on your land in such a position and with such little care that it gets down to the stratum where the water is common to you and to your neighbour, or to any other owner of land, is a natural use of the land. In my opinion, therefore, subject to the other point on which Mr. Justice *Pearson* relied, if the Defendants have, as on the evidence they must be taken to have done, by their filth interfered with the Plaintiff's natural right of taking this water, they are liable to an action; and in fact the Solicitor-General practically admitted that, because he said if the water had gone by natural force of gravity from the Defendants' land to the Plaintiff's, he could hardly contend that the Defendants would not be liable. But then it is said that it is the consequence of the Plaintiff's own act that he gets the water polluted. Now in one sense that is true, that is to say, if the Plaintiff did not draw water from this stratum there would be no polluted water going down to the water which was under his land; but the Plaintiff is not seeking to get water from the Defendants' land. He is seeking merely to exercise his natural right of getting the water from this stratum. The water comes not simply from the Defendants' well; it comes from that cone or section of the circle which the water is drawn from, and as

(1) 7 H. L. C. 349.

he is exercising his own right to take the water which is under his soil, in my opinion he can maintain a right of action against the Defendants where the natural consequence of his exercising his own right is that there comes water which had been polluted by the act of the Defendants. The Plaintiff has a right to take all the water under his soil as far down as human skill can get it, and pumping machinery being an appropriate means of getting the water which is in the underground stratum, the Defendants cannot, in my opinion, be held not liable, because, from the Plaintiff's using powerful means of getting the water, the water comes to his well which would not otherwise have done so. In my opinion the Plaintiff is entitled to judgment against the Defendants.

LINDLEY, L.J.:—

The question decided in *Acton* v. *Blundell* (1) and *Chasemore* v. *Richards* (2) was the right of a landowner to remove underground water from his own land when that water did not flow in any visible defined channel. The Court decided that every owner of land has a right to sink a well in his own land and to take from his well all the water he can get, and that as every owner has this right no owner can maintain an action against another for exercising that right, even although by exercising it he drains underground water from the plaintiff's land and so deprives him of water which would otherwise come to his well. The alternative was to hold that no one could take water from his own well to such an extent as materially to affect the supply to those whose wells were fed from the same sources as his own. This alternative was considered too inconvenient to be laid down as law, and the Court was consequently driven to reconcile the conflicting rights of neighbouring landowners in the way it did, and to draw a distinction, as regards the right to get naturally supplied water, between water in defined and visible channels and water percolating through the soil and not yet in any defined visible channel. How far the distinction was sound it is useless now to inquire; it is settled in law by the highest judicial authority. But the reasons for the distinction must be borne in mind, or the decisions establishing

(1) 12 M. & W. 324. (2) 7 H. L. C. 349.

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it may be misunderstood, and be made the basis of reasoning, leading to results which are as startling as they were unforeseen.

The right to foul water is not the same as as the right to get it; and in my opinion does not depend on the same principles. *Primâ facie* every man has a right to get from his own land water which is naturally found there, but it frequently happens that he cannot do this without diminishing his neighbour's supply. In such a case the neighbour must submit to the inconvenience. But *primâ facie* no man has a right to use his own land in such a way as to be a nuisance to his neighbour, and whether the nuisance is effected by sending filth on to his neighbour's land, or by putting poisonous matter on his own land and allowing it to escape on his neigbour's land, or whether the nuisance is effected by poisoning the air which his neighbour breathes, or the water which he drinks, appears to me wholly immaterial.

If a man chooses to put filth on his own land he must take care not to let it escape on to his neighbour's land: *Tenant* v. *Goldwin* (1); and not let it poison the air which reaches it: *Comyns'* Dig (2). So if a man chooses to poison his own well he must take care not to poison waters which other persons have a right to use as much as himself. To hold the contrary on the ground that the water is not their property until they get it, and that it is poisoned before they get it, is to take an inadequate view of the subject, and to overlook the fact that the law of nuisance is not based exclusively on rights of property. Light is not property, and yet if a man has a right to have it come to his windows he can maintain an action against those who prevent it from so coming. So air is not property, but a man who poisons the air which another has a right to breathe commits an actionable wrong. Upon precisely the same principle underground water which supplies a well may not be the property of the owner of the well, but he has a right to take and use such water, and upon principle he appears to me to have a right of action against those who poison what he has a right to get. If indeed the well owner had no right to get unpolluted water he would have no right of action, but it lies upon those who deny this right to maintain their position. *Primâ facie*, at all events, the right of a man to get water

(1) 1 Salk, 21, 360. (2) Action on the Case for Nuisance, A.

from his well is to get the water as nature supplies it, and if any one contends that he has a right to pollute the natural supply he must establish such right. A right to foul a stream may be acquired by prescription; and possibly a right to foul an underground basin of water might be similarly acquired; but no such question arises in this case. Upon principle, therefore, and independently of authority, the judgment below cannot be supported.

On turning to the authorities there is not one which warrants the judgment; whilst there are at least three which are difficult to reconcile with it: *Womersley* v. *Church* (1), *Hodgkinson* v. *Ennor* (2), and *Whaley* v. *Laing* (3). These decisions shew that *primâ facie* one man has no right to foul water which another has a right to get; and if he has a right to get it the fact that by pumping he draws it partly from the defendant's land is immaterial. The moment any water is taken out of the well, by whatever means, its place is supplied by natural causes operating on all the surrounding water which supplies the well, and if the well is used at all and any of such surrounding water is poisoned by soluble matter it will inevitably find its way into the well. Probably the same thing would take place, though more slowly, by simple diffusion without pumping, but however this may be, the fact that the Plaintiff has used a pump to get water out of his well, and has thereby drawn poisoned water from the Defendants' land, does not deprive the Plaintiff of his right to maintain an action against the Defendants for poisoning water which supplies the Plaintiff's well.

In my opinion the decision appealed from ought to be reversed. The Plaintiff is entitled to an inquiry as to the damages he has sustained, and to an injunction, and to the costs of the action and of the appeal.

Solicitors for Plaintiff: *G. H. K. & G. A. Fisher.*

Solicitors for Defendants: *Wright & Pilley*, agents for *Ruston, Clark, & Ruston, Brentford.*

(1) 17 L. T. (N.S.) 190. (2) 4 B. & S. 229; 32 L. J. (Q.B.) 231.
(3) 2 H. & N. 476; 3 H. & N. 675.

W. P.

V.-C. B.

1885

Feb. 14.

PERCIVAL *v.* DUNN.

[1883 P. 2568.]

Equitable Assignment—Order for Payment of Money—Specific Fund—Practice —"Point of Law"—Dismissal of Action—Rules of Supreme Court, 1883, *Order xxv.. rr.* 2, 3.

An order by a creditor to his debtor to pay a sum of money to a third person is not an equitable assignment unless it specifies the fund or debt out of which the payment is to be made.

Thus, where *A.*, a builder, being a debtor to the Plaintiff, *P.*, but a creditor of the Defendant, handed to *P.* the following order signed by *A.* and addressed to the Defendant, who received due notice thereof: "Please pay *P.* the amount of his account, £42 14*s.* 6*d.* for goods supplied":—

Held, that the order did not operate as an equitable assignment.

The decision of the Judge on a "point of law" raised in an action under Rules of Supreme Court, 1883, Order xxv., rule 2, having substantially disposed of the whole action, the action was, under rule 2, dismissed with costs.

POINT OF LAW under Rules of Supreme Court, 1883, Order xxv., rule 2.

The statement of claim alleged as follows:—

The Plaintiff, *Percival*, was a builder and brickmaker, and the Defendant, *Dunn*, a surveyor and land agent, who was, at the date of the matters in question, acting as agent for the owner of the *Park* estate at *Tottenham, Middlesex*. The Defendant let part of the *Park* estate to one *Davis* and one *Cook* respectively upon building agreements, and agreed to make them certain advances from time to time as the buildings were erected.

On the 30th of June, 1883, *Davis*, being indebted to the Plaintiff in the sum of £42 14*s.* 6*d.* for materials supplied and goods lent on hire for the purposes of the buildings, agreed to pay the amount out of moneys then payable, and to become payable, to him, *Davis*, by the Defendant, and accordingly handed to the Plaintiff the following order or direction:

"*Tottenham*, June 30, 1883.

"Dear Sir,—Please pay Mr. *Percival* the amount of his account and oblige. £42 14*s.* 6*d.* for goods delivered at *Park*.

"To *J. Dunn*, Esq. "*W. Davis.*"

On the 2nd of July *Cook*, being similarly indebted to the Plaintiff in the sum of £44 7*s.*, handed to him the following order or direction:

"To Mr. *Dunn*. "July 2nd, 1883.

"Dear Sir,—Please pay Mr. *William Percival* the amount of his account being £44 7*s.*, for goods supplied on the *Park* estate, *Tottenham*. I agree to accept the sum of £20 on 7th day of July, 1883, and £20 on 14th July, and the balance on the next week, 21st July, 1883.

"*C. Cook.*"

The Defendant had notice of both of the said orders on or shortly after the respective dates thereof.

At the date of the said orders moneys were due from the Defendant to *Davis* and *Cook*, and other moneys had since become due to them from him, "subject"—as the statement of claim alleged—"to the equitable assignments hereinbefore mentioned."

The Plaintiff, being unable to obtain payment from the Defendant under the two orders, claimed accounts from the Defendant of the moneys due from him to *Davis* and *Cook*, and payment of the two sums of £42 14*s.* 6*d.* and £44 7*s.*

In his statement of defence the Defendant alleged that the advances to *Davis* and *Cook* were made under building agreements between the Defendant as lessor and those parties respectively as lessees, containing a clause that the lessor would make advances to the lessee for the purpose of enabling him to roof in the houses thereby agreed to be erected, in such sums, not exceeding in the aggregate £100 per house, and at such times as *Dunn* should certify in writing; such sums, with interest at 5 per cent. per annum, to be a charge on the premises and to be repaid within one month after the roofing of the house in respect whereof the advance should have been advanced.

The Defendant then denied that any moneys were due from him to either *Davis* or *Cook*, and in paragraph 10 stated as follows:

"The Defendant does not admit that the alleged orders of the 30th June and the 2nd July, 1883, are equitable assignments, and denies that advances agreed to be made as by the said building agreements provided could be equitably assigned."

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The Defendant, in conclusion, stated that no certificates such as were by the building agreements required as a condition precedent to an advance had at the date of the alleged orders been or subsequently were or ought to have been given by him; and that neither *Davis* nor *Cook* had ever completed or roofed in the buildings to his satisfaction.

By an order made by his Lordship in Chambers on the 19th of December, 1884, on the Defendant admitting the two orders or directions for payment of money mentioned in the statement of claim, and also that he refused payment under them, the point of law raised by paragraph 10 of the statement of defence was ordered to be set down for hearing and disposed of before the trial.

This point of law was accordingly now argued.

H. Burton Buckley, for the Defendant:—

I submit, first, that the documents in question are not equitable assignments; and, secondly, that even if they could be so construed, there is no fund which can be equitably assigned. The documents are simply unconditional orders in writing falling, it would seem, within the definition of a bill of exchange under the *Bills of Exchange Act*, 1882. By sect. 3, sub-sect. 1, of that Act, a bill of exchange is defined to be "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer." These are mere directions to pay, imposing upon *Dunn* a liability in damages to the persons who gave them for non-payment. There is no specified fund which can be the subject of an equitable assignment to the Plaintiff. To constitute an equitable assignment there must be either an agreement between the debtor and the creditor that the debt shall be paid out of a specific fund coming to the debtor, or an order given by the debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay those particular funds to the creditor: *Rodick* v. *Gandell* (1). Neither of those conditions has been fulfilled in the present case.

(1) 1 D. M. & G. 763, 777.

H. E. Lawrance, for the Plaintiff:—

The case is covered by *Brice* v. *Bannister* (1), where a person indebted to the plaintiff gave him an order addressed to the defendant as follows: "I do hereby order, authorize, and request you to pay to *William Brice* the sum of £100 out of moneys due or to become due from you to me,"—words substantially the same as those in the present case; and it was held that the order operated as a valid assignment of £100. That decision was approved in *Ex parte Hall* (2). And in *Burn* v. *Carvalho* (3) it is laid down that in Equity an order given by a debtor to his creditor, upon a third person having funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund. The fund in this case consists of the moneys to be advanced by the Defendant under the building agreements for roofing in the houses. With regard to the *Bills of Exchange Act*, 1882, that Act did not alter the previous law as to what was a bill of exchange, and therefore does not now make a document a bill of exchange which was not one previously.

Buckley, in reply:—

In *Brice* v. *Bannister* the order was to pay out of a certain fund, but here the order is merely a general direction to pay.

BACON, V.C.:—

In my opinion, the substitution of this new practice of stating a point of law for that of demurrer is a change very happily introduced, for it answers all the purposes which were accomplished under the old practice, it obtains the same result, and it saves delay and expense to the parties.

On the point of law now raised, it is clear that there is no ground on which I can say these documents are equitable assignments. They are, and they purport to be, requests to *Dunn* to pay money which the writers owe to some one else. They merely mean this: "Lend me so much money, as I want to pay the man to whom I am indebted." [His Lordship read the documents.]

(1) 3 Q. B. D. 569. (2) 10 Ch. D. 615.
(3) 4 My. & Cr. 690, 702.

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The cases referred to all proceed on the view that the document before the Court in each of them was equivalent to an assignment. In *Ex parte Hall* (1), there was an order to pay out of a particular fund, and so in *Burn* v. *Carvalho* (2) and *Brice* v. *Bannister* (3); and if I found in this case similar words referring to a particular fund due or belonging to the writers of these requests, I should be bound to follow those authorities; but I find nothing like such words in these documents. There is nothing in them to the effect that the sums mentioned were to be paid out of a fund for which *Dunn* was answerable, or which he was under any obligation to pay.

Whether bills of exchange or not, they are, on the face of them, mere polite notes by one person asking some other person to pay his debt, and impose no kind of obligation upon that other person to pay the debt.

The case appears to me to fall directly within the new rules. Under the 2nd rule of Order XXV., either party to an action can raise a point of law to be disposed of by the Judge. Acting under that rule, I have no hesitation in deciding the point of law in favour of the Defendant. Then, as in my opinion, my decision substantially disposes of the whole action, under the power conferred upon me by the 3rd rule I dismiss the action, with costs.

Solicitors: *J. R. Slade; Houghtons & Byfield.*

(1) 10 Ch. D. 615. (2) 4 My. & Cr. 690, 702.
(3) 3 Q. B. D. 569.

G. I. F. C.

HALL-DARE *v.* HALL-DARE.

V.-C. B.
1885
March 19.

[1883. H. 3142.]

Disentailing Deed—Enrolment—Settlement—Mistake—Rectification—Jurisdiction—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *ss.* 40, 47 [*Revised Ed. Statutes, vol. vii., pp.* 499, 500].

Having regard to sects. 40 and 47 of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), the Court has no jurisdiction to rectify, on the ground of mistake, a deed which has been enrolled as a disentailing assurance under the Act, although the rectification asked is not in the disentailing part of the deed, but in a resettlement added to it which might have been effected by a separate unenrolled deed.

A testator, who died in 1836, devised his estates, subject to a prior limitation to *A.* for life, to the use of *B.* for life, with remainder to the use of "the first and other sons of *B.* in tail," with remainders over. In 1878, by a deed enrolled as a disentailing assurance under the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), *B.*, and *C.* his then only son, with the consent of *A.* as protector of the settlement, conveyed the estates, subject to *A.*'s life estate, but discharged from *B.*'s life estate and *C.*'s estate tail in remainder under the will, to the use of *B.* for life, with remainder to the use of *C.* in tail, with remainder to uses in favour of the Defendant and his issue.

It appeared to have been the intention of the parties to this resettlement to preserve therein the limitation in the will to "the first and other sons of *B.* in tail," but shortly after the death, in 1880, of *C.* a bachelor, *B.* being still living, it was discovered that this limitation had been omitted, and that consequently the limitations over in favour of the Defendant and his issue took effect to the exclusion of *B.*'s future issue, if any.

In an action by *A.* and *B.* against the Defendant, who was an infant, to have the deed of 1878 rectified by the insertion, next after *C.*'s estate tail, of a limitation to *B.*'s "second and other sons in tail:"—

Held, that by sect. 47 of the above Act the Court was prohibited, in such a case, from exercising its ordinary jurisdiction as to the rectification of mistakes in deeds.

ROBERT WESTLEY HALL-DARE, by his will, dated the 25th of January, 1836, devised *Ilford Lodge* and *Castle Rising Farm*, in the county of *Essex*, to the use of his son, the Plaintiff *Francis Marmaduke Hall-Dare*, for life, with remainder to the use of the first and other sons of the said *F. M. Hall-Dare* in tail general, with remainder to the use of the testator's son, the Plaintiff, *Henry Hall-Dare*, for life, with remainder to the use of the first

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and other sons of the said *H. Hall-Dare* in tail general, with remainder to the use of every other son of the testator who should thereafter be born in tail general, with remainder to the use of the testator's son, *Robert Westley Hall-Dare* (No. 2) for life, with remainder to his first and other sons in tail general, with remainders over.

The testator died on the 20th of May, 1836, leaving three sons, namely those mentioned in his will.

F. M. Hall-Dare was a bachelor. *H. Hall-Dare* had issue one child, *Henry Arthur Kekewick Hall-Dare*. *R. W. Hall-Dare* (No. 2) had one son, *Robert Westley Hall-Dare* (No. 3).

R. W. Hall-Dare (No. 2) died on the 23rd of April, 1866, and *R. W. Hall-Dare* (No. 3) died on the 18th of March, 1876, leaving two sons, the Defendants, *Robert Westley Hall-Dare* (No. 4), his elder son, and *Arthur Mildmay Hall-Dare*, both infants.

At the date of the indenture next hereinafter mentioned the Plaintiff *F. M. Hall-Dare* was tenant for life in possession of the devised estates, the Plaintiff *H. Hall-Dare* and his son, *H. A. K. Hall-Dare*, were respectively tenant for life and tenant in tail thereof in remainder expectant on the death of the Plaintiff, *F. M. Hall-Dare*, without issue; and the Defendant, *R. W. Hall-Dare* (No. 4) was tenant in tail thereof in remainder expectant on the failure or determination of the estate tail limited by the will to the first and other sons of the Plaintiff *H. Hall-Dare*, and the prior estates limited thereby, with remainder to the Defendant *A. M. Hall-Dare* in tail.

By an indenture dated the 28th of February, 1878, and made between the Plaintiff *H. Hall-Dare* of the first part, the said *H. A. K. Hall-Dare* of the second part, the Plaintiff *F. M. Hall-Dare* of the third part, and the Defendant *Henry Harper Bothamley* of the fourth part, and enrolled in Chancery on the 5th of March, 1878, after reciting that the Plaintiff *H. Hall-Dare* and the said *H. A. K. Hall-Dare* were desirous (the Defendant *R. W. Hall-Dare* (No. 4) being already amply provided for by a previous settlement therein mentioned) of resettling the said devised estates, It was witnessed that the Plaintiff *H. Hall-Dare* and the said *H. A. K. Hall-Dare*, with the consent of the Plaintiff, *F. M. Hall-Dare* as protector of the settlement, granted to the

Defendant, *Bothamley*, the said devised estates, to hold the same to the Defendant, *Bothamley*, subject and without prejudice to the limitations in the will prior to the life estate of the Plaintiff *H. Hall-Dare*, but freed and discharged from the life estate in remainder of the Plaintiff *H. Hall-Dare*, and from the said estate tail of the said *H. A. K. Hall-Dare* and the subsequent estates in remainder, To the use of the Plaintiff *H. Hall-Dare* for life, in substitution for his life estate in remainder under the will, "and from and after the death of the said Plaintiff *H. Hall-Dare*, To the use of the said *H. A. K. Hall-Dare*, and the heirs of his body, and in default of such issue To the use of the Defendant *A. M. Hall-Dare* and his assigns during his life without impeachment of waste, and from and after the death of the Defendant *A. M. Hall-Dare*," To the use of his first and other sons in tail, with remainder To the use of the Defendant *R. W. Hall-Dare* (No. 4) for life, with remainder to his first and other sons in tail, with remainders over. And the Plaintiff *F. M. Hall-Dare* was thereby appointed protector of the settlement during the joint lives of the Plaintiff *H. Hall-Dare* and the said *H. A. K. Hall-Dare*, and the life of the survivor of them.

H. A. K. Hall-Dare died on the 27th of November, 1880, a bachelor, and without having barred his estate tail under the last mentioned indenture.

The Plaintiffs alleged that this indenture was executed by the parties under the belief that all the estates and limitations created by the will prior to the estate tail thereby limited to the first and other sons of *R. W. Hall-Dare* (No. 2) had been preserved; but that it had been recently discovered that the limitation in tail to the sons of the Plaintiff *H. Hall-Dare*, other than *H. A. K. Hall-Dare*, was by inadvertence omitted from the said indenture. In order, therefore, to effectuate the alleged intention of the parties, the Plaintiffs brought this action to have the indenture rectified by the insertion therein, next after the estate tail thereby limited to *H. A. K. Hall-Dare*, of a limitation to the second and other sons of the Plaintiff *H. Hall-Dare* in tail general.

In their statement of defence the infant Defendants did not admit that the limitation in tail to the sons of the Plaintiff

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H. Hall-Dare, other than *H. A. K. Hall-Dare*, was by inadvertence omitted from the re-settlement of 1878; and they stated that at the time the deed was prepared and executed the Plaintiff *H. Hall-Dare* was a widower and *H. A. K. Hall-Dare* was his only son, and it was not contemplated that there was any likelihood of the Plaintiff *H. Hall-Dare* marrying again, though as a matter of fact he did re-marry in 1882, when it was for the first time alleged by the Plaintiffs that there was an accidental omission in the deed.

Upon this statement of defence the Plaintiffs joined issue, and the action now came on for trial upon evidence by affidavit.

The Plaintiffs' case was supported by an affidavit of their solicitor, who had acted for the *Hall-Dare* family for many years. With reference to the circumstances under which the re-settlement of 1878 was prepared, he stated that, with a view to carrying out the wishes of the Plaintiff *H. Hall-Dare* and his son *H. A. K. Hall-Dare*, as stated in the statement of claim, he prepared instructions to counsel, shortly stating the title and containing the following paragraphs: "It is now desired by Mr. *H. A. K. Hall-Dare* to disentail the estates with the consent of Mr. *F. M. Hall-Dare* as protector, and to resettle the same on the original footing (subject to the altered state of the family), but altering the succession by substituting *Arthur Mildmay Hall-Dare* and his sons in tail male for *R. W. Hall-Dare* (No. 4) . . . . The only object being to give *A. M. Hall-Dare* the benefit of the chance of succeeding before his brother, the prior rights must be strictly preserved."

The draft of the deed was then prepared by counsel, and was also submitted to other counsel on behalf of *H. A. K. Hall-Dare*, with instructions to the effect that "the said *H. A. K. Hall-Dare* is desirous that no alterations in his position under his grandfather's will shall be made, but that he shall be in all respects able to deal with the property as freely as before." The solicitor further stated that he entirely overlooked the fact that the re-settlement of 1878 omitted a limitation to the sons of the Plaintiff *H. Hall-Dare*, other than *H. A. K. Hall-Dare*, in tail male, and that the deed was executed by all parties on his advice, in the full belief that all the estates and limitations created by the original will

prior to the estate tail thereby limited to the first and other sons of *R. W. Hall-Dare* (No. 2) had been preserved by the deed. He further stated that the omission was first discovered in the course of the preparation of a petition presented to the Court in 1881 under the *Settled Estates Act*, 1877, for the sale of the estates comprised in the deed, and that the necessity of applying for a rectification of the deed was mentioned to the Court on the hearing of the petition. The counsel who settled the draft also made an affidavit stating that in preparing and settling the draft he intended to act strictly upon his instructions, but that in framing the limitations he inadvertently overlooked the possibility of the Plaintiff *H. Hall-Dare* marrying again and having other sons who might under the original will become tenants in tail in remainder after the estate tail of *H. A. K. Hall-Dare*, and thus neglected to provide for them as he should have done pursuant to his instructions.

Each of the Plaintiffs also made an affidavit shewing that the re-settlement of 1878 had been prepared upon a mistaken view of his intentions.

No affidavits were filed on behalf of the Defendants against the Plaintiffs' claim.

Hemming, Q.C., and *Byrne*, for the Plaintiffs, submitted that the Court ought to carry into effect the intention of the parties, as clearly shewn by the evidence.

Marten, Q.C., and *T. Ribton*, for the Defendants :—

The question is, whether the Court has jurisdiction to rectify a deed that has been enrolled under the *Fines and Recoveries Act*, 3 & 4 Will. 4, c. 74. It would seem that the Court has no such jurisdiction, for by sect. 47 (1) in cases of dispositions under the

(1) Sects. 40 and 47 of the Act, both referred to in the course of the argument, are as follows :—

Sect. 40: "That every disposition of lands under this Act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will), by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: Provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this Act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether

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Act by tenants in tail, the jurisdiction of the Court in regard to the supplying of defects in the execution of the powers of disposition given by the Act to tenants in tail, and the supplying under any circumstances of the want of execution of such powers of disposition, is expressly excluded. The powers of disposition by a tenant in tail are regulated by sects. 15 and 40; sect. 42 providing for the consent to every such disposition by the "protector of the settlement" created by sect. 15; and the directions of the Act had been strictly followed in the present case. There seems, therefore, to be no mode of rectifying this settlement, the ordinary jurisdiction of the Court to rectify deeds on the ground of mistake being excluded by the Act, and *H. A. K. Hall-Dare*, one of the parties to the deed, being now dead.

Hemming, in reply:—

I submit that the present case does not fall within the purview of the Act at all. The object of the Act was merely to substitute a new process of barring estates tail for the old procedure by fine

supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this Act, notwithstanding such disposition shall be made or evidenced by deed; and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed."

Sect. 47: "And be it further enacted, that in cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof, the jurisdiction of Courts of Equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this Act to tenants in tail, or of the powers of consent given by this Act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a Court of law would not be an effectual disposition or consent under this Act; and that no disposition of lands under this Act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this Act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would in case of an estate tail at law be an effectual disposition or consent under this Act in a Court of law."

and recovery. The new process is by a simple deed enrolled. Upon an estate tail being thus barred, the tenant in tail can, by the same or a separate deed, make a re-settlement, but the re-settlement, if made by a separate deed, is not required to be enrolled, enrolment only being necessary for the operation of barring the entail; so that if the re-settlement is made by the same deed, enrolment is only required to give effect to that part of it which bars the estate tail. An examination of those sections of the Act which are material to the present case, will shew that it was the intention of the Legislature to deal exclusively with the mode of barring estates tail, and not to touch re-settlements. Sect. 40 (1) excludes all parol arrangements, and requires that every disposition by a tenant in tail shall be by deed, and shall be of no force unless made or evidenced by deed; then sect. 41 requires every such deed to be enrolled, and sect. 46 also requires the consent of the protector to the disposition of a tenant in tail to be also enrolled if given by a separate deed. The power of disposition given by the Act is the power of barring an estate tail as effectually as it would have been barred by fine and recovery, and the intention of the Act, as shewn by the above sections, is that no estate tail shall be barred unless the prescribed process has been gone through, and no mere contract to bar an estate tail shall be capable of being enforced. In fact the Act concerns itself solely with the new machinery for barring an estate tail. Read by the light of this explanation sect. 47 clearly means this—that if a tenant in tail has executed an imperfect instrument which does not bar the estate tail, or the protector has imperfectly executed his power of consent, the Court cannot supply the defect in the execution; neither can it direct specific performance of a contract to bar an estate tail, otherwise the machinery expressly provided by the Act for barring estates tail would be liable to be set aside and a mere contract substituted for it. If then in the present case the deed of 1878 had been defective as a disentailing deed we could not have come here; but the deed is not defective as a disentailing assurance. What we wish supplied is an omission, not in that part of the deed which constitutes the disentailing assurance, and which is perfect

(1) See note, *ante*, p. 137.

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as such, but in the re-settlement, which is a separate and distinct portion of the deed, and outside the purview of the Act, for there is nothing in the Act which excludes the ordinary jurisdiction of the Court in the rectification of settlements. Had this re-settlement been by a separate deed the jurisdiction of the Court to rectify it could not have been doubted; and I submit that the mere accident of the re-settlement being contained in the same deed that bars the entail is not sufficient to oust that jurisdiction.

BACON, V.C.:—

I regret very much to hear what has been stated—and stated I have no doubt, with perfect veracity and perfect sincerity—by the persons who make affidavits in support of this claim; but I cannot take upon myself to interfere with such an Act of Parliament as the *Fines and Recoveries Act*, and especially with that part of it which provides for the enrolment of deeds, and which expressly makes the enrolment a conclusive determination of all the facts comprised in the deed. Nobody can dispute that, whatever else the Act of Parliament, valuable and extensive as it is, meant to do, it meant to do that. It meant that a deed once enrolled should not be disturbed.

The 40th section enacts as follows:—[His Lordship read the section, and proceeded.] So that whether there is a contract by a tenant in tail to make a disposition of his lands, however formal, or a deed, however regularly executed, evidencing such a contract, such a mode of disposition is prohibited by the statute. The only mode of disposition is by an assurance (not being a will) capable of passing an estate at law in fee simple. The requisition that the assurance shall be enrolled within a limited period comes in another section.

The 47th section, which has been quoted, and which appears to me to conclude the question, provides "that in cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof, the jurisdiction of Courts of Equity shall be altogether excluded either on behalf of a person claiming"—repeating the words of the 40th section—"for a valuable or meritorious consideration or not." And then

follows a catalogue of things which are mentioned as falling within the prohibitory provisions of the statute.

In regard to "the specific performance of contracts"—and I may assume that there was a contract between the parties to the effect which the Plaintiffs in this action allege—that is excluded. As to "the supplying of defects in the execution" of the powers given by the statute, no such question arises here. The section then goes on to say, "and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a Court of Law would not be an effectual disposition or consent under this Act." I need read no more. It appears to me that there is a most positive prohibition against this Court exercising that jurisdiction which undoubtedly it originally possessed and does still possess where the Legistature has not taken it away—I mean that of the rectifying of mistakes. In the present case I cannot but be satisfied, upon reading the affidavits, that there was a mistake; but it is such a mistake as by the statute I have no right to rectify, and, therefore, I cannot interfere. Indeed it would be a very violent thing as against these Defendants, who are entitled to interests under a regularly enrolled deed—and which appears to have been deliberately and consistently prepared—to say that I should deprive these persons of the rights which are at the present time possessed by them under this deed. I cannot do so. I dare not do any such thing. I should, in this instance, be committing wrong by doing it. If I assented to this claim, I know not what applications might be made hereafter. I do not know how many reasonable, or specious if not reasonable, applications might be made to rectify enrolled deeds. I only know that the law gives me no power to rectify this deed, and I am compelled therefore to dismiss this action, and it must be dismissed with costs.

Solicitors: *Freeman & Bothamley; Crawley, Arnold, & Co.*

G. I. F. C.

V.-C. B.
1885
March 30.

In re RHOADES.
LANE *v.* RHOADES.

[1884 R. 2483.]

Will—Residue—Direction that Share "shall fall into residue."

A testator bequeathed the residue of his personal estate to his wife for life, and after her death to his sister and three brothers in equal shares; but directed that in the event of his sister dying unmarried in his wife's lifetime (which happened) "her one-fourth should fall into the residue":—

Held, that there was no intestacy as to the sister's one-fourth, but that the whole residue was, on the widow's death, divisible in thirds between the three other legatees.

Humble v. *Shore* (1), *Lightfoot* v. *Burstall* (2), and *Crawshaw* v. *Crawshaw* (3) considered.

ADJOURNED SUMMONS.

William Rhoades, by his will, dated in 1865, after certain bequests, bequeathed the residue of his personal estate to trustees upon trust for conversion and investment and to pay the income to his wife for life, and after her death to pay the legacies therein mentioned: And as to the residue of his personal estate, after payment of costs and legacy duties, he bequeathed the same "unto my sister *Mary Ann Rhoades* and my three brothers, *John Rhoades*, *Thomas Rhoades*, and *Joseph Rhoades*, in equal shares to divide the same share and share alike; but my will is that in the event of my said sister dying unmarried in my said wife's lifetime her one-fourth shall fall into the residue: and my further will is that in the event of my brother *Thomas Rhoades* being deceased in my said wife's lifetime his one-fourth share shall be paid to the child or children of my said brother *Joseph Rhoades* living at the death of my said wife in equal parts and portions, the issue of any child deceased to represent its parent's share, and I give and bequeath the same accordingly."

The testator died in 1867, and his widow on the 12th of December, 1883.

Of the four residuary legatees, three died in the widow's life-

(1) 7 Hare, 247; 1 H. & M. 550, n. (2) 1 H. & M. 546.
(3) 14 Ch. D. 817.

time, namely, *Mary Ann Rhoades*, who was never married, *John Rhoades*, and *Thomas Rhoades*. *Joseph Rhoades* was still living and had children who were living at the death of the testator's widow.

A question having arisen whether, upon the construction of the will, *Mary Ann Rhoades'* one-fourth of the residue was undisposed of, or whether it accrued to the other residuary legatees, this originating summons was taken out under Rules of Court, 1883, Order LV., rule 3, by the Plaintiff, the testator's sole legal personal representative and next of kin, against the Defendant, the said *Joseph Rhoades*, to have it determined: (1.) Who were the persons among whom, upon the death of the testator's widow, his residuary personal estate became divisible, and in what shares and proportions; and (2.) By whom or out of what fund the costs of the application ought to be borne.

Renshaw, for the Plaintiff:—

I submit that the residue is divisible in fourths, and that there is an intestacy as to *Mary Ann Rhoades'* one-fourth: *Humble* v. *Shore* (1) and *Lightfoot* v. *Burstall* (2); followed in *In re Barker's Estate* (3). *Crawshaw* v. *Crawshaw* (4) seems opposed to the two first mentioned cases, but it is distinguished in *In re Barker's Estate*.

Stokes, for the Defendant *Joseph Rhoades*, was not called upon.

BACON, V.C.:—

I need not hear you, Mr. *Stokes*. The cases of *Humble* v. *Shore* and *Lightfoot* v. *Burstall* are very plain. When a testator devises the residue of his property in certain shares, and directs that in a certain event one of those shares shall fall into the residue, the direction is mere surplusage, and means nothing more than what the law would imply without it, that is, that the share of residue shall be disposed of in the way it shall be disposed of by law. The share subject to that direction is a separate and distinct share. But in the present case, the testator, in disposing of his

(1) 7 Hare, 247; 1 H. & M. 550, n.
(2) 1 H. & M. 546.
(3) 15 Ch. D. 635.
(4) 14 Ch. D. 817.

V.-C. B. 1885 *In re* RHOADES. LANE *v.* RHOADES.

residue, means, I think, to say that it shall be divided into four shares, but that an event may happen to render another division necessary, and in that event it shall be divided into thirds. He means that there shall be a division into fourths, if there are four persons, but that if there are only three persons then the division is to be in thirds. The testator's sister cannot have any share of the residue until the widow's death, and if she dies during the widow's lifetime the trustees are to divide the residue into three shares. With great respect to the decision in *Humble* v. *Shore* (1) —a decision from which, as the late Master of the Rolls said in *Crawshaw* v. *Crawshaw* (2), I am not at liberty to depart—I find a plain distinction between that case and the present. In that case the decision proceeded on the ground that there was a separate and distinct share given to be applied as directed by the will, and that share lapsed.

I am of opinion that in the events which have happened there is a division of the residue into thirds and not into fourths, and that *Mary Ann Rhoades*, who died in the widow's lifetime, was not entitled to any share.

I therefore answer the first question by declaring that upon the death of the testator's widow the residue became divisible into thirds and not into fourths, and that one third went to *John Rhoades*, another third to the Defendant *Joseph Rhoades*, and the remaining third to the children of *Joseph Rhoades*. The costs of all parties as between solicitor and client will be paid out of the estate.

Solicitors: *Starling & Giblett*, agents for *H. C. Beddoe, Hereford; E. T. Hargraves.*

(1) 7 Hare, 247; 1 H. & M. 550, n. (2) 14 Ch. D. 817.

G. I. F. C.

KILFORD *v.* BLANEY.

V.-C. B.

1885

March 30.

[1884 K. 1085.]

Will—Debts and Legacies—Charge—Exoneration—Mortmain Act—Lapsed Bequest.

Where a testator, having bequeathed his personal estate, exonerates it from debts and legacies, which he charges on real estate, and part of the bequest lapses or fails under the *Mortmain Act*, the exemption does not extend to the lapsed portion.

A testatrix devised her real estate to trustees in trust for sale, and directed them, out of the proceeds, to pay her funeral and testamentary expenses, debts, legacies, and duties; and she directed her trustees to sell her leaseholds, and to apply the proceeds in payment of so much of her debts, &c., as the proceeds of her real estate should be insufficient to pay; and she bequeathed all her personal estate to a charity. Part of the personal estate consisted of a mortgage debt, as to which the bequest failed and lapsed to the Crown, there being no next of kin:—

Held, that the debts, expenses, legacies, and duties were chargeable, first, on the impure personalty; secondly, on the real estate; and thirdly, on the leaseholds.

ADJOURNED SUMMONS.

Susannah Meere, who died in 1882, by her will dated in 1879, after appointing the Plaintiffs, *William Kilford* and *William Betteridge*, her executors, devised her dwelling-house in *Windsor Street, Chertsey*, and all other her real estate, unto and to the use of the Plaintiffs upon trust for sale; and she declared that the Plaintiffs should, out of the moneys to arise from such sale, pay her funeral and testamentary expenses, and debts, legacies and duties payable thereon; and should there be any surplus arising from the sale of her said house after such payments, the same to be divided equally between the children of *Henry Weston*, junior, who might be living at her death. And after bequeathing various legacies free of duty, the testatrix directed her trustees to sell her ground rents on certain houses in *London*, and to apply the proceeds in the following manner, namely, should the money to arise from the sale of her freehold house in *Chertsey* be insufficient to pay her debts, funeral expenses and legacies, then to apply so much of the proceeds of sale of the said ground rents as

V.-C. B. 1885 KILFORD v. BLANEY.

should be sufficient for that purpose, and to divide the surplus equally between all the children of *Henry Weston*, senior, as should be living at her death; but in case no part of the said proceeds should be required to pay her debts, funeral expenses and legacies, then to divide the whole proceeds of sale of the said ground rents equally between such children. And the testatrix bequeathed to the plaintiffs all her personal estate upon trust for conversion, and to pay over the proceeds to the churchwardens for the time being of the parish of *Chertsey* upon trust to invest the same, and apply the income for the benefit of deserving poor of *Chertsey*, as therein mentioned.

The testatrix's real estate consisted only of her said freehold house in *Windsor Street, Chertsey*, which was sold by the Plaintiffs for a net sum of £478 6*s.* 2*d.* Her "ground rents," consisting of leaseholds, were also sold for a net sum of £89 0*s.* 11*d.* Her personal estate bequeathed upon the charitable trusts above mentioned consisted of £700, "impure personalty," being money owing on mortgage of freehold property, and £1643 8*s.* 1*d.*, "pure personalty."

Doubts having arisen in the administration of the estate as to how the debts, funeral and testamentary expenses, legacies and duties, amounting in all to £849 17*s.* 2*d.*, should be borne, this originating summons was taken out by the Plaintiffs, the trustees and executors, against the churchwardens of the parish of *Chertsey*, the children of *Henry Weston*, junior, and the Attorney-General as representing the Crown, there being no next of kin, to ascertain, amongst other things, out of what portions of the estate the debts, funeral and testamentary expenses, and the legacies and duties thereon, ought to be respectively paid.

Chubb, for the Plaintiffs.

Hemming, Q.C., and *Bramwell Davis*, for the Defendants, the churchwardens:—

We admit that the charitable bequest so far as it relates to the £700 mortgage debt, fails, that sum being impure personalty, but with that exception we take the whole of the personalty. The exemption from debts, &c., in favour of the charity as particular

legatee does not extend to the lapsed bequest: *Waring* v. *Ward* (1): *Dacre* v. *Patrickson* (2). The debts, &c., should therefore first be borne by the impure personalty which has lapsed, then out of the real estate, and lastly out of the leaseholds.

Swinfen Eady, for the Defendants, the children of *H. Weston*, junior, devisees of the real estate:—

The real estate is exonerated, and the whole burden falls on the personalty: *Robertson* v. *Broadbent* (3).

Stirling, for the Crown:—

It is clear that the £700 secured on mortgage falls within the *Mortmain Act*: *Attorney-General* v. *Hurst* (4). As to the question whether the debts, &c., should, in the first instance be borne by this £700 which has lapsed, the rule is that personalty which, through an intestacy, has lapsed to the next of kin, is subject to the same liability as to costs, and no more, as it would have been subject to if the gift had taken effect: *Eyre* v. *Marsden* (5); and impure personalty in the hands of the Crown is subject to no greater liability than if it had gone to the next of kin; so that it is only liable to bear a proportion of debts, legacies, and costs. The following is, I submit, the order of liability. First, it should be ascertained what proportion of the debts, &c., falls on the pure and impure personalty respectively; secondly, the real estate exonerates only the pure personalty; and thirdly, the leaseholds exonerate both the pure and impure personalty: *Browne* v. *Groombridge* (6). Thus the Crown takes the impure personalty with the benefit of exoneration out of the leaseholds.

It is the testator's plain intention that the freeholds shall form the primary fund, and the leasehold the second; and that the general personal estate shall not be resorted to unless the other two funds fail.

Hemming, in reply, referred to *Jarman* on Wills (7), and *Jones* v. *Bruce* (8).

(1) 5 Ves. 670, 676.
(2) 1 Dr. & Sm. 182, 186.
(3) 8 App. Cas. 812.
(4) 2 Cox, 364.
(5) 4 My. & Cr. 231, 245–6.
(6) 4 Madd. 495.
(7) 4th Ed. vol. ii. p. 668.
(8) 11 Sim. 221.

V.-C. B. BACON, V.C.:—

1885

KILFORD v. BLANEY.

No doubt the questions raised in this case are of extreme importance, but one can only be guided to a conclusion by the language of the will itself. I cannot help thinking that Mr. *Hemming's* contention must prevail, and that the whole burden of the debts, expenses, legacies and duties falls, in the first instance, upon the impure personalty, and that the real estate must so far be exonerated. The first source for payment is the impure personalty. I cannot conceive on what grounds Mr. *Stirling's* contention can be supported. The plain intention of the testatrix, as expressed in her will, and the justice of the case, put the question beyond all doubt.

I therefore hold that the impure personalty which has lapsed must first be resorted to. All the burden is primarily laid upon that. Then, in the next place, resort is to be had to the real estate, and lastly to the leasehold ground rents.

Solicitors: *Beaumont & Warren*, for *Paine & Brettell, Chertsey; Ellis, Munday & Bartrum; Hare & Co.*

G. I. F. C.

BRADFORD BANKING COMPANY *v.* BRIGGS & CO.

FIELD, J.

1885

March 13.

[1884 B. 2495.]

Mortgage—Priority—Deposit of Certificates of Shares—Lien of Company on Shares for Moneys due from Shareholder—Notice.

The articles of association of a company provided that the company should have a first and permanent lien and charge, available at law and in equity, on every share, for all debts due from the shareholder to the company. A shareholder deposited the certificates of his shares with his bankers as security for the balance then due from him to them on his current account, and notice of the deposit was given to the company:—

Held, that *Hopkinson* v. *Rolt* (1) applied, and that the company could not claim priority over the bankers in respect of moneys which became due from the shareholder to the company after notice of the bankers' advance, but that the bankers were entitled to priority.

ACTION by mortgagees by equitable deposit of deeds and certificates of shares for an account of what was due to them for principal, interest, and costs, and to have their securities realized by foreclosure or sale.

Henry Briggs, Son, & Co., Limited, were a company incorporated by registration under the *Companies Act*, 1862. They carried on the business of coal proprietors. By clause 100 of the articles of association no transfer of shares could take place without the approval of the board of directors. By clause 102 it was provided that, if the board should disapprove of a proposed transfer, they should, if the shareholder should so require by notice in writing, either purchase for the company, or procure some person to purchase, the shares at the market value thereof at the date of such purchase, and, in the event of their failing to do so within fourteen days after being required to do so, the proposed transfer should be deemed to be approved. By clause 103, "The company shall have a first and permanent lien and charge, available at law and in equity, upon every share of every person who is the holder, or one of several joint holders, thereof, for all debts due from him, either alone or jointly with any other person, whether a shareholder or not, to the company."

(1) 9 H. L. C. 514.

FIELD, J.
1885
BRADFORD BANKING COMPANY v. BRIGGS & CO.

William Fletcher and *J. F. Easby* were respectively shareholders in the company. Each of them carried on business as a coal merchant, and purchased coals from *Briggs & Co.*

On the 6th of November, 1879, *Fletcher* deposited with the *Bradford Banking Company* the title deeds of some property belonging to him, and also the certificates of some shares belonging to him in *Briggs & Co.*, together with a memorandum of deposit, to secure the balance then due, and which should from time to time become due, on his current account with the *Banking Company*, with interest thereon. On the same day *Easby* made a similar deposit of title deeds and certificates of shares in *Briggs & Co.* with the *Banking Company*, to secure the balance then due, and which should from time to time become due, on his current account with interest thereon. The certificates of the shares stated that the shares were held subject to the articles of association of the company. On the 13th of November, 1879, notice of these deposits was given by the *Banking Company* to *Briggs & Co.*, and on the 15th of November, 1879, the receipt of the notice was acknowledged by *Briggs & Co.* At this time *Fletcher* owed *Briggs & Co.* £124 5*s.* 8*d.*, and *Easby* owed them £206 4*s.* 2*d.* In June, 1881, *Easby* deposited with the *Banking Company* the certificates of some more shares in *Briggs & Co.*, as security for the balance of his current account with the *Banking Company*, with interest thereon. Notice of this deposit was given to *Briggs & Co.* on the 20th of June, 1881, and the receipt of the notice was acknowledged by *Briggs & Co.* on the 22nd of June, 1881, in a letter from the secretary, which said, "We think it right to inform you that Mr. *Easby* is indebted to us, and that under a clause of our articles of association we have a first and permanent lien upon all shares held by him." At this time *Easby* was indebted to *Briggs & Co.*, but the amount due from him was repaid in September, 1881. On the 5th of July, 1882, *Fletcher* deposited with the *Banking Company*, as further security for the balance of his current account, with interest, the certificates of some more shares in *Briggs & Co.* In a letter to the *Banking Company* which accompanied the certificates *Fletcher* said, "I beg to hand over to you the enclosed shares in *Henry Briggs, Son, & Co.*, and after that company's accounts have been met to hand you

the balance." On the 11th of July, 1882, notice of this deposit was given by the *Banking Company* to *Briggs & Co.*, and on the same day the receipt of the notice was acknowledged by a letter from the secretary, which said, "We accept such notice without prejudice to our rights (as creditors of Mr. *Fletcher*) under the articles of association of the company, and particularly the right of primary lien under clause 103, which provides that the company shall have a first and permanent lien upon every share of every person who is the holder for all debts due from him to the company." At this time *Fletcher* owed the company £782 10*s.* 5*d.* On the 1st of December, 1883, *Fletcher* filed a liquidation petition. At that time he owed *Briggs & Co.* about £1000 for coal supplied. On the 31st of December, 1883, *Easby* filed a liquidation petition. At that time he owed *Briggs & Co.* for coal supplied £1593 5*s.* 3*d.* After the date of the notice of the 22nd of June, 1881, *Easby* received no further advances from the *Banking Company*. At that time he owed them a large sum. After the date of the notice of the 11th of July, 1882, *Fletcher* received further advances from the *Banking Company*, and made them various payments from time to time.

This was the trial of the action.

Ince, Q.C., and *Farwell*, for the Plaintiffs:—

The Plaintiffs are entitled to priority over any debts which became due to *Briggs & Co.* from the shareholders subsequently to notice of the Plaintiffs' advance: *Hopkinson* v. *Rolt* (1). *New London and Brazilian Bank* v. *Brocklebank* (2) does not apply.

W. W. Karslake, Q.C., and *Dibdin*, for *Briggs & Co.*:—

The Plaintiffs have not got a transfer of the shares; they have only an equitable security, and it is subsequent in date to that of *Briggs & Co.* By virtue of clause 100 of the articles of association the Plaintiffs could not obtain a transfer without the consent of the directors of the company. The certificates of the shares shewed that they were held subject to the articles of association of the company, and gave the Plaintiffs notice of the provisions of the articles. The shares exist only subject to the lien created by

(1) 9 H. L. C. 514. (2) 21 Ch. D. 302.

FIELD, J.
1885
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clause 103; that lien is of their very essence, and it cannot be defeated. This distinguishes the case from *Hopkinson* v. *Rolt* (1). The right of the first mortgagees in that case to security for further advances was not of the essence of the land which was mortgaged to them. In *Hopkinson* v. *Rolt* there was not a contract that the mortgagor should not obtain advances from any one so as to defeat the priority of the first mortgagee. There is such a contract by virtue of clause 103 between the shareholders and the company: *In re London, Birmingham and South Staffordshire Banking Company* (2). An equitable mortgagee of shares is in no better position than the *cestui que trust* of shares standing in the names of his trustees. In such a case the lien of the company on the shares for a debt due from the trustees is prior to any right of the *cestui que trust*: *New London and Brazilian Bank* v. *Brocklebank* (3).

H. Charlton Hawkins, for the trustee in the liquidations of the shareholders.

Farwell, in reply:—

Clause 103 gives the company a first lien only subject to equities existing at the time when the shareholder's debt is contracted. The lien is "permanent" only in the sense that it remains until it is satisfied. It would be very inconvenient if a shareholder could not raise money on his shares.

FIELD, J.:—

I have come to the conclusion that the Plaintiffs are right in their contention, and that they are entitled to priority over any debts which became due from the shareholders to *Briggs & Co.* subsequently to the receipt by them of notice of the Plaintiffs' advance. The argument on behalf of the company is an attempt to revive a dead body. It apparently had some life in it in the year 1715, although that is open to great question. It depends upon the view which ought to be taken of the various reports of *Gordon* v. *Graham* (4), and of Lord *Cowper's* decision in that case. But

(1) 9 H. L. C. 514.
(2) 34 Beav. 332.
(3) 21 Ch. D. 302.
(4) 2 Eq. C. Ab. 598.

the matter was set at rest in 1856 by the decision of the House of Lords in *Hopkinson* v. *Rolt* (1), the effect of which was, no doubt, to alter the contract between the parties. But it alters the contract upon a principle of equity which is very intelligible. When a charge is created by equitable deposit, the substantial owner of the property is the mortgagee, though the actual owner is the mortgagor. If the property is worth considerably more than the charge, the mortgagor is the substantial owner, and it is exceedingly important that, if a man has a valuable property, he should be able to take it into the market and convert it into money by means of obtaining advances upon it. We know that at the present day enormous sums of money are constantly advanced on deposit of deeds and share certificates and things of that kind, and this is a very healthy operation of commerce. Therefore the learned Lords said in *Hopkinson* v. *Rolt* that the mortgagor is in effect the owner of the property *ultra* the charge on it, and that he has a right to go into the market and to borrow money upon it, and that he is not to be restricted by the possible contingency that the first mortgagee might choose to make further advances at some future day. A mortgagee who is not bound to make further advances may never advance another penny, he may always refuse to do so, and, if another person lending money to the mortgagor could not obtain priority over further advances made by the first mortgagee, the mortgagor would practically never be able to borrow any money at all. That is precisely the state of things here. For what purpose does the shareholder have the certificates of his shares in his possession? Is it to be imagined for a moment that he will keep them locked up in a box? He may be a trader whose life consists in his being able to get money for the purpose of his business. Is he to have no power of obtaining any advance at all on his shares, because he may hereafter become indebted to the company? It would be very unreasonable so to hold, and therefore it seems to me that the principle of *Hopkinson* v. *Rolt* applies. I cannot distinguish the clause in the articles in the present case from the actual effect of the first mortgage deed in *Hopkinson* v. *Rolt*. In *Hopkinson* v. *Rolt* the first mortgagees had a first charge, and

(1) 9 H. L. C. 514.

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a permanent charge, permanent in the sense that it was to remain as long as anything was due to them. Therefore, notwithstanding the very able argument of Mr. *Karslake* and Mr. *Dibdin*, I remain unconvinced that it was the intention of the parties to this contract that the company's lien should be a lien not only for the debts which should be due to them from the shareholder at any particular time, but also for any debts which should thereafter become due, although the company might have had notice of an advance by another person. I do not think that the words "first and permanent" can be enlarged by any fair construction into that meaning.

The company had a first charge upon the shares for any debts which should become due to them by the shareholder, but, after that charge had been created, and before any of the debts now sought to be recovered by the company were incurred, the shareholder exercised his right of borrowing money upon the shares by means of an absolute charge on them to the bank. The company had notice of that charge, and I think that from that time they had no power to make advances to the shareholders so as to rank in priority to the debts due to the bank.

MINUTE OF ORDER:—Declare that the bank's charge on *Easby's* shares is prior to that of *Briggs & Co.*, and that, as regards *Fletcher's* shares, the rule in *Hopkinson* v. *Rolt* (1) and *Daun* v. *City of London Brewery Company* (2) applies.

Solicitors for Plaintiffs: *Paterson, Snow & Co.*, agents for *Gardiner & Jeffery, Bradford.*

Solicitor for company: *R. Vincent*, agent for *North & Sons Leeds.*

(1) 9 H. L. C. 514. (2) Law Rep. 8 Eq. 155.

W. L. C.

BULLERS *v.* DICKINSON.

KAY, J.

1885

Jan. 27, 28; *Feb.* 2, 3.

[1883 B. 4055.]

Light and Air—Ancient Light—Rebuilding—Alteration in Position—Preservation of Ancient Light.

In rebuilding a house, which had an ancient light in its ground floor front-room, the front wall, which originally stood out beyond the general building line four feet at one end and seven feet at the other, was set back into the general building line; and in the new front wall was placed a window the position of which corresponded to a great extent with the position of the ancient light in the old front wall. The new room was about the same frontage breadth as the old, but included little more than half the site of it, viz., a depth of nine feet at one end, and less than four feet at the other:—

Held, that the right to the ancient light had not been lost.

ONE of the defences to an action to restrain an alleged interference with light and air was that there had been a loss or abandonment of an ancient light in the Plaintiff's house, No. 1, *Jacob Street, Bermondsey*, under the following circumstances:—

No. 1, *Jacob Street*, was originally an old wooden toll-house three storeys high at the corner of *Jacob Street* and *Gilbert Court*, with a frontage to *Jacob Street* of 14 ft. 6 in. This old house stood out into the road, so that its frontage was not in a line with the rest of the buildings in *Jacob Street*, but at an angle to them, and the house projected forward into the street 4 ft. at the west and 7 ft. 9 in. at the east. The ground floor room was used as a shop, and practically the whole ground floor front from about 3 ft. above the ground was occupied by the shop window and the glass of the shop door, and between the door and the window there was only a jamb of about 6 in. wide. The dimensions of the old room or shop were about 14 ft. 6 in. in breadth of frontage, with sides of 13 ft. in depth at one end and 11 ft. in depth at the other end.

Nine years before the commencement of the action the old house was pulled down by the then owner, who sold the projecting part of the site to the vestry of the parish for the purpose of widening and straightening the street; and without (in the

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result of the evidence) any interval of time he erected a brick building of one storey on the remainder of the site. In so doing he carried back the frontage to the line of the rest of the street, and made the door open into *Gilbert Court* instead of into *Jacob Street*; and he placed in the front wall a window substantially on the same level with the old window, though the sill was a trifle higher. The new front wall was set further back than the old wall, 4 ft. at the west and 7 ft. 9 in. at the east, and the new ground floor room included little more than half the site of the old one, viz., only a depth measured from the new line of frontage of about 9 ft. at one end, and less than 4 ft. at the other. Some of the witnesses called this new room a shed, and it was used for the storage of iron. The accompanying plan shews approximately the alterations in the ground plan. The width of

Jacob Street was 24 ft., and at this distance from the new frontage of No. 1 the Defendant had erected a building 57 ft. high.

Hastings, Q.C., and *Dibdin*, for the Plaintiff:—

The new window is substantially the same as the old window and glass door, it occupies rather a small area, but unquestionably a large portion of the light which would have passed over the servient tenement through the old window and glass door

must pass through the new window: *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* (1).

Rigby, Q.C., and *Ingle Joyce*, for the Defendant:—

The ancient light in the old building has been lost or abandoned.

The Plaintiff has not shewn any coincidence between the old and the new windows. The whole of the old house was pulled down, and some time afterwards a new building was erected further back. The new building is in no way the same as the old one. The new front wall where the window is is not in the same plane as, nor even parallel to, the old front wall, and the new ground floor, so far as it occupies the site of the old, is a narrow strip which cannot have the character or incidents of a room.

Again, in the conveyance to the vestry there was no reservation of the ancient lights, nor any stipulation that the piece of the old site sold to them should be thrown into the street. The land, including the wall and the aperture through which the old light passed, was sold to them out and out, and the vestry might have built to any height they chose upon it.

They cited *Newson* v. *Pender* (2).

[KAY, J., referred to *Fowlers* v. *Walker* (3).]

Dibdin, in reply, referred to *Aynsley* v. *Glover* (4).

KAY, J., after stating the facts with reference to the alteration of the ancient light, continued:—

It has been argued that the right to have this ancient light has been lost or abandoned, and accordingly those who maintain this argument have the burden of proof thrown upon them. One of their contentions has been that there was an interval between the pulling down of the old toll-house and the erection of the new building, but that has been displaced by the evidence, for the rebuilding in fact took place immediately after the pulling down. There is therefore no evidence of abandonment by delay.

(1) 6 Ch. D. 757.
(2) 27 Ch. D. 43.
(3) 51 L. J. (Ch.) 443.
(4) Law Rep. 18 Eq. 544.

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But it has also been sought to make out the abandonment thus: It is said that the site of the old house was originally so small, and that so large a portion of that site has been thrown into the street, that it is inconceivable that the remainder of the available space could be used as a room. But I am not satisfied of this; and it is in evidence that it has actually been used as a shed for storing iron. And let me put this case: Suppose only so much of the old house as projected into the street had been pulled down, and a wall had been built across the opening thus made, leaving the rest of the house standing, and with a window in that wall in a position corresponding with that of the ancient light, could it be said that the ancient light had been abandoned? Certainly not. Then although the room is now a small room, I cannot say that the light has been abandoned, because instead of pulling down the part of the house projecting into the street, the whole of it has been pulled down and the rebuilding has taken place on the part of the site retained. Therefore, on this head again the Defendant has failed to prove any intention to abandon.

Then it has been contended that the light has been lost owing to the proceedings of the vestry, who purchased part of the site, and might it is said have built upon that part themselves. But this part of the site was given up for the purpose of widening the street, and this new building was immediately erected with a light looking into the street. Everybody knew that a new building was intended to be made on the part of the site retained, and there never was any intention on the part of the vestry to build upon the piece of land which they took. And had there been any such intention on their part probably the owner would never have sold it. It is said that the conveyance to the vestry is silent as to this ancient light, but the deed may well have been silent considering that it was a conveyance to a public body who only wanted to widen the street, and did not want to build upon the land at all. But with questions such as these between the owner of No. 1 *Jacob Street* and the vestry, the Defendant has nothing whatever to do. As to him the only question is whether the Plaintiff has not got a right to light coming from the Defendant's land to this window, and the conclusion

which I come to on this part of the case is that the Plaintiff has such a right, that he has never abandoned it, and that he is entitled to look upon this window as an ancient light.

[His Lordship then dealt with the other parts of the case, which do not call for a report.]

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Solicitors: *C. T. Foster; G. S. Hare.*

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In re CHILLINGTON IRON COMPANY.

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Company—General Meeting—Poll—Mode of taking Poll—Chairman, Direction of—Companies Act, 1862, *Table A, Art.* 43, [*Revised Ed. Statutes, vol. xiv., p.* 255.]

The articles of association of a company provided (in the terms of art. 43 of Table A to the *Companies Act*, 1862) that if at any general meeting of the company a poll should be demanded it should be taken "in such manner as the chairman shall direct."

A poll having been demanded at a meeting summoned to consider a resolution for a voluntary winding-up, the chairman directed the poll be taken then and there. It was so taken, and the resolution was carried:—

Held, that the poll had been rightly taken.

Reg. v. *D'Oyly* (1) followed.

Observations on the *dicta* of *Jessel*, M.R., and *Brett*, L.J., in *In re Horbury Bridge Coal, Iron, and Waggon Company* (2).

PETITION.

One of the articles of association of this company (art. 50) provided with reference to the proceedings at general meetings of the company as follows:—"If a poll be demanded by five or more members it shall be taken in such manner as the chairman shall direct. The result of such poll shall be deemed to be the resolution of the company in general meeting."

An extraordinary general meeting of the company, summoned for the purpose of considering the advisability of passing a resolution for a voluntary winding-up, was held on the 12th of January, 1885. At this meeting, after a resolution for a voluntary winding-up had been lost upon a show of hands, the directors and

(1) 12 Ad. & E. 139. (2) 11 Ch. D. 109, 114.

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their friends demanded a poll; and the chairman, notwithstanding a protest by one of the shareholders, directed that the poll should be taken then and there; the poll was accordingly taken then and there, and the resolution was carried.

This was a petition by an unsecured creditor for a winding-up order, and the only question calling for a report was whether the course adopted by the chairman in directing the poll to be taken then and there was within his power, and whether therefore the poll so taken was valid.

Phipson Beale, for the Petitioner, was content to take either a compulsory or a supervision order.

J. G. Wood, for *M. J. M. Banks* and others, shareholders:—

In directing the poll to be taken at once the chairman was acting improperly and exceeding his powers. When the poll was demanded he ought to have adjourned the meeting, so that absent shareholders might have an opportunity of voting, and the risk of a resolution being improperly snatched might be avoided. The *dicta* in *In re Horbury Bridge Coal, Iron, and Waggon Company* (1) are in point. There (2) *Jessel*, M.R., says: "We must import into the case our common knowledge that where a poll is demanded it never is taken there and then, and I am by no means of opinion that a chairman could direct it to be so taken;" and Lord Justice *Brett* also says in the same case, "You will have some difficulty in persuading me that if a poll is demanded, a chairman can appoint it to be held there and then without notice to anybody not present." Accordingly the resolution for a voluntary winding-up was not validly passed, and the Court can only make a compulsory order.

W. Pearson, Q.C., and *G. Curtis Price*, for unsecured creditors, supported a compulsory order upon other grounds.

Hastings, Q.C., and *Theobald*, for the company:—

In *In re Horbury Bridge Coal, Iron, and Waggon Company* no poll had been demanded or was taken, and the observations referred to were merely *obiter dicta*. They are, moreover, at

(1) 11 Ch. D. 109. (2) 11 Ch. D. 114.

variance with the judgment of *Denman*, C.J., in *Reg.* v. *D'Oyly* (1), a case, not cited to the Court of Appeal, where the point actually arose for decision. As a matter of general law it is not only within the chairman's power to direct the poll to be taken immediately, but it is his duty so to take it if time admits, and here the 50th clause of the articles of association (which is in similar terms to clause 43 of Table A of the *Companies Act*, 1862), prescribes that the poll shall be taken "in such manner as the chairman shall direct." [They also referred to *Re Phœnix Electric Light and Power Company* (2).]

Borthwick, for creditors and shareholders, supported a supervision order.

KAY, J.:—

The Petitioner in this case now states that he would be satisfied with the usual supervision order; but that is opposed on behalf of some other unsecured creditors, and also on behalf of a contributory.

The first contention with which I must deal is that raised by the contributory, viz., that the resolution passed was not a legal resolution, and for this one reason, that a poll being demanded, and a protest raised by one shareholder against the poll being then taken, the chairman directed that the poll should be then and there taken, and it was so taken accordingly. It is said that was not within his power, and therefore that the resolution is illegal.

Art. 50 of the company's articles of association, which provides that a poll shall be taken in such manner as the chairman shall direct, is in terms precisely similar to those of the 43rd article of Table A to the *Companies Act*, 1862.

Now it is said that this resolution was illegal, because the chairman was bound by some general law to defer the poll to an adjourned meeting in order to give all the shareholders another chance of voting at the poll. *Primâ facie* one does not see why that should be, because every shareholder must have had notice of this particular meeting at which the resolution was passed,

(1) 12 Ad. & E. 139, 159. (2) 48 L. T. (N.S.) 260.

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and might have attended if he had chosen, or sent his proxy, and in one way or other secured that his vote should be taken. Is it the usual custom—is it the universal custom—at public meetings to defer, when a poll is asked for, the taking of the poll to an adjourned meeting? If so, I confess I was not aware of it. However, I do not profess to set up my own personal knowledge as worth anything in such a matter, particularly when I find that in the case which has been cited of *In re Horbury Bridge Coal, Iron and Waggon Company* (1), the late Master of the Rolls and the present Master of the Rolls are stated to have made the observations which have been quoted. The point, however, to which those observations were addressed did not arise for decision in that case, and was not decided; and although it seems to have been argued that a poll could have been taken then and there, no case on the subject was cited. But a case has been cited to me of *Reg.* v. *D'Oyly* (2), where the point arose distinctly, and where, after considerable argument, Lord *Denman* gave judgment upon it. I see that Sir *John Campbell*, Attorney-General, Mr. *Thesiger*, and Mr. *Swann* were on one side, and Sir *Frederick Pollock*, Mr. *Cresswell*, and Mr. *Hayes* on the other side. The meeting upon which the question arose in that case was a vestry meeting summoned by churchwardens for the purpose of electing new churchwardens, and Lord *Denman* in his judgment said (3): "The meeting being held, and a show of hands taken, some one was to declare on whom the nomination had fallen. Who was to do that? Not the body of the parishioners who had made the nomination, nor the old churchwardens, but the person presiding at the vestry, namely, the rector. A poll is then demanded: and it is demandable as of right; and the president of the meeting is the person to grant it. In the absence of other business, the poll should be taken immediately: if time does not allow of that, there must be an adjournment for the purpose. Then who is to direct the adjournment? It is suggested that a majority of the voters should do so. But how is the majority to be ascertained in so large a constituency?" Then he goes on to say that it is not a matter for the majority to decide upon whether there should

(1) 11 Ch. D. 109. (2) 12 Ad. & E. 139.
(3) 12 Ad. & E. 158.

be an adjournment or not, but the question is one which ought to be decided by the president of the meeting. I take that to be a statement, after considerable argument, by a very eminent Judge of what the common law is with reference to meetings, and the mode of holding them, and what is the legal course to take when a poll is demanded. And I confess I was surprised to find that it had ever been suggested with regard to a meeting, held under the *Companies Act*, 1862, under a rule in the words of the 43rd article of Table A, that a poll demanded at a meeting of that kind could not, if the chairman so directed, be taken at that meeting.

It seems to me, with great respect to the *dicta* which have been cited to me, that that is not the law. The law is distinct that a poll can be taken at that same meeting, and it is impossible for me to say that this resolution was illegal upon that ground. It seems to me from what I have seen of this kind of meeting, that if it were illegal on that ground, a great many resolutions passed for winding up companies would have been invalid. I cannot possibly therefore hold, it seems to me, that the resolution was on that ground illegal.

[His Lordship then dealt with other parts of the case, which do not call for a report, and ultimately made a supervision order upon the ground that it was a case in which the wishes of the shareholders should have due regard paid to them, because, although it was suggested that the company might turn out to be insolvent, there was enough upon the accounts as stated to shew that with a careful liquidation it might turn out that the company was not insolvent. Therefore (said his Lordship) the shareholders are the persons who are far more interested than the creditors are in having an economical winding-up of the company so as to save if possible some surplus for themselves.]

Solicitors: *Miller, Smith, & Bell; Pilgrim & Phillips,* agents for *Watson, Esam & Barber, Sheffield; Pilcher; Harvey & Capron,* agents for *Duke & Howlett, Birmingham.*

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Feb. 10, 11.

UNITED TELEPHONE COMPANY *v.* SHARPLES.

[1884 U. 327.]

Patent—Importation and User of Apparatus made Abroad according to the Specification of an English Patent—Infringement—User for Experiment and Instruction.

User of a pirated article for the purpose of experiment and instruction is user for advantage, and an infringement of the patent.

The Defendant, an English electrician, purchased and imported from foreign manufacturers apparatus which if made here would have infringed the Plaintiffs' patent. The Defendant maintained that he had only purchased the apparatus for examination and experiment by himself and his pupils, as certain royalty-paid instruments in his possession were too expensive to be taken to pieces; and he insisted that he had never sold, and had never otherwise used the apparatus:—

Held, that such user of the pirated apparatus by the Defendant was a user for advantage and an infringement of the patent.

THE Plaintiffs are the proprietors of the patent rights in certain telephonic apparatus known as "*Bell* Telephones" and "*Blake* Transmitters," and the Defendant, Mr. *G. Sharples*, carries on business as a chemist and electrician, or telegraph engineer, at *Preston*, in *Lancashire*, under the firm of *Sharples & Co.*

In November, 1883, the Defendant, who had in his possession certain royalty-paid *Bell* telephones and *Blake* transmitters, saw an advertisement by the *American Telephone Company* of *Rotterdam* in the *Electrical Review*, offering *Bell* telephones and *Blake* transmitters of ordinary construction for sale, and on the 5th of that month he wrote to them saying that he might shortly require a few *Blake* transmitters and *Bell* telephones for export, and requesting the company to state their prices. Having ascertained the prices charged by the *Rotterdam* company, which were much lower than those for which the patented articles could be bought in *England*, the Defendant, on the 10th of November, ordered two *Blake* transmitters and two *Bell* telephones, which were shortly afterwards sent by the company and received and paid for by the Defendant.

On the 9th of January, 1884, the Defendant wrote to the

Rotterdam company: "The telephones and transmitters you sent us we tested before sending to our customers abroad: they answered very well. I regret being unable to give you further orders, as of course we cannot use or sell the instruments in *England*, but hope to get further export orders, when I will communicate with you. I believe you have an order for a complete instrument and some bells not yet executed. Please send these, as I wish to keep them by me as samples." These further articles were subsequently sent to the Defendant and paid for by him, and on the 25th of March the Defendant wrote to the *Rotterdam* company: "The telephones and transmitters we had from you were for a small export order. We should not for one moment think of using them in *England*. We have a good supply of royalty-paid instruments—in fact, rather more than I think we should have in the present state of the *Bell* and *Edison* patents."

These transactions having come to the knowledge of the Plaintiffs, they brought this action against the Defendant in order to restrain him from infringing their patents.

At the hearing the Plaintiffs proved, *inter alia*, that the apparatus supplied by the *Rotterdam* company were much less expensive than the royalty-paid instruments.

The defence admitted that the instruments purchased from the *Rotterdam* company would, if manufactured in this country, have infringed the Plaintiffs' patents, but alleged that the Defendant had merely purchased them for examination and experiment by himself and his pupils in his laboratory in order to see if he could improve upon them, that he had never otherwise used them, and that since the commencement of the action he had sent them out of the country as a present to one M. *Julius Bärlein* of *Moscow*.

Mr. *C. H. Sharples*, the son of the Defendant and the writer of the letters above-mentioned, was called as a witness for the defence, and he admitted in cross-examination that the statements in the correspondence that the firm wanted the apparatus for export to customers abroad were untrue, and said that he inserted those statements because he did not wish the *Rotterdam* company to think his firm were trading in *England* with infringing instruments.

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Theodore Aston, Q.C., *Moulton*, and *A. J. Ashton*, for the Plaintiffs :—

The importation and using or vending in *England* of apparatus manufactured abroad according to the specification of an English patent, is an infringement of that patent.

[KAY, J. :—That question arose in *Caldwell* v. *Vanvlissengen* (1).]

And also in *Elmslie* v. *Boursier* (2). So is importation for export, where the article has, while in this country, been applied to the purpose for which it was manufactured : *Betts* v. *Neilson* (3) ; at all events, when the importers are in possession of the article : *Nobel's Explosives Company* v. *Jones, Scott, & Co.* (4). Possession is evidence of intention to use : *Adair* v. *Young* (5) ; and in *United Telephone Company* v. *London and Globe Telephone and Maintenance Company* (6) mere possession was treated as user and an infringement, because there was property in the pirated article on the part of the defendants.

The evidence in this case leads to the conclusion that the apparatus in question was in fact imported by the Defendant for export and sale, and this is clearly an infringement. But even if the defence that they were not imported for export and sale is true, the admitted user of them for the purpose of experiment and instruction of pupils is an infringement, for it is a user for the advantage of the Defendant, as enabling him to experiment more cheaply than he could with the royalty-paid instruments, and a user most damaging to the patentees, as enabling rival manufacturers to compete with them : *Neilson* v. *Betts* (7).

[They also referred to *Minter* v. *Williams* (8).]

Hastings, Q.C., and *Goodeve*, for the Defendant :—

The Plaintiffs' privilege is to "make, use, exercise, and vend" the invention which is the subject of their patents. The Defendant has neither made nor vended, nor has he exercised or used it so as to infringe the patents.

(1) 9 Hare, 415.
(2) Law Rep. 9 Eq. 217.
(3) Ibid. 3 Ch. 429.
(4) 17 Ch. D. 721 ; 8 App. Cas. 5.
(5) 11 Ch. D. 136 ; 12 Ch. D. 13.
(6) 26 Ch. D. 766.
(7) Law Rep. 5 H. L. 1.
(8) 4 Ad. & E. 251 ; S. C., Goodeve, P. C. 210.

Mere purchase and importation of a pirated article not for sale or profit is no infringement, and the importer may subsequently lawfully export it as a present: *Hindmarsh* on Patents (1). There must be a user for profit in this country: *Holmes* v. *London and North Western Railway Company* (2); *Nobel's Explosives Company* v. *Jones, Scott & Co.* (3); *Von Heyden* v. *Neustadt* (4); *Betts* v. *Neilson* (5); *Wright* v. *Hitchcock* (6); *Sykes* v. *Howarth* (7). It need not, perhaps, be a user for pecuniary profit, but it must be a user for advantage; and it is perfectly lawful to import from abroad a pirated article, pull it to pieces, and improve it: *Muntz* v. *Foster* (8); or to use it for the purpose of experiment and instruction: *Frearson* v. *Loe* (9); for this is neither making, using, or vending.

[They also referred to *Jones* v. *Pearce* (10).]

KAY, J. (after reviewing the evidence), said:—

It is admitted by the counsel for the Defendant that if a man buys abroad, imports into this country, has in his possession here, and sells, although to a foreign customer, an instrument which he knows would if made, sold, or used in this country be an infringement of an English patent, that would be an infringement of such patent. I confess I have little hesitation in acceding to this, and in my opinion, upon the balance of the evidence, this is what was actually done in this case. Therefore I hold upon that ground that there has been a clear infringement of these patents.

But suppose that this was not the case, what is the alternative story? The witness *Sharples* says, "We used these instruments for the purpose of experiment; the cost of them was so small that we could afford to allow our pupils to pull them to pieces or experiment with them." Now they had, as he says, a number of the so-called royalty-paid instruments, which were more costly; and he says, again and again, "We could not afford to let our pupils use those, and pull them in pieces or experiment with them, and

(1) Page 492.
(2) 12 C. B. 831; S. C., Macrory, P. C. 13, 21; Goodeve, P. C. 177.
(3) 8 App. Cas. 5; judgment of Lord *Blackburn*, pp. 10, 13.
(4) 14 Ch. D. 230.
(5) 6 N. R. 221.
(6) Law Rep. 5 Ex. 37.
(7) 12 Ch. D. 826.
(8) 2 Webst. P. C. 92.
(9) 9 Ch. D. 48.
(10) 1 Webst. P. C. 122, 124.

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therefore it was that we bought these, which were very much cheaper, in order that our pupils might experiment with and use these, instead of using the more expensive instruments."

I am asked to say that that was not a user in this country. What does the word "pupil" mean? The Defendant says that the pupils are persons who do not pay anything for being taught, but, on the contrary, that those of them who have been a certain time, or certain classes of them, receive some payment. But whether these pupils, these young persons, who are admitted into this business for the purpose of learning it do or do not pay for their instruction it is obvious enough that they are paid very much less than an ordinary assistant would be paid who did not want to learn the business. They are admitted upon the terms that part of the remuneration they shall get for their services shall be instruction in the business. And to say that to buy a telephone which is an infringement of an English patent for the purpose of instructing your pupils who are learning the business, to let them use and experiment with it, to let them, if they please, pull it in pieces, for the purpose of saving the expense of using the patent telephone and experimenting with or pulling that to pieces, to say that that is not a user in this country, is a thing to which I cannot accede. It seems to me plainly to be a user. If it were nothing but this, that it was fixed (as has been proved) between the lower room and the switch-room for the purpose of being used by the pupils who could not be trusted with the use of the more costly instrument, it would be a part of the instruction of those pupils, and the person who so used it would be getting the advantage of instructing his pupils by means of this cheaper instead of the more expensive instrument. I asked Mr. *Goodeve* whether he carried his proposition thus far, that there could be no user of a patent unless it produced a direct pecuniary advantage to the person who used it? At first he seemed inclined to go so far, but I think at last he receded from that position; because I put to him this very obvious case: Suppose, for example, if the *Singer* sewing machine were protected by patent, a man should buy a cheaper instrument which he knows is an infringement of the patent, for some member of his household, who uses it, let us say, for amusement simply, would that be a user in

this country or not? Without any doubt it would, although it did not produce to or save him one farthing. Therefore Mr. *Goodeve* modified his proposition to this, that "it must be a user for the purpose of advantage." Well, then, is not the user which I have been describing a user for the purpose of advantage? If not I do not know what advantage means or user means. It seems to me that even if I were to accept the story that there was no sale, which I cannot believe to be true, even on this alternative view of the case, there was such a user of these articles made in imitation of the *Bell* and *Blake* patents as it would be impossible to maintain in this country. As far as I can make out, according to this alternative story, these instruments were kept until after this action was begun, when the Defendant was advised, as he says, to export the instruments in question, in order, as he frankly admits, that they should not be forthcoming at the trial of this action.

I do not think it necessary to consider the other parts of the case, because one instance of clear infringement of the patent is quite enough to justify the order which it seems to me the Court is bound to make. That order is, that there be a perpetual injunction against the Defendant *Sharples*, restraining him from infringement of the Plaintiffs' patents, and I order him to pay all the costs of this action.

Solicitors: *Waterhouse, Winterbotham, & Harrison; Davidson & Morriss.*

W. W. K.

KAY, J.

1885

March 6, 7.

EDMONDS *v.* ROBINSON.

[1883 E. 1455.]

Partnership—Premium—Judgment for Dissolution—Order for Accounts being prosecuted—Summons for Direction for a Return of Part of Premium.

Where a Plaintiff, who entered into a partnership for a long term of years and paid a premium, of which, in certain events, that did not happen, he was to have a proportion returned to him, obtained judgment for a dissolution and an order for accounts and inquiries, and after the accounts had been prosecuted, asked, by summons, for a direction that he was entitled to be credited with a sum as for return of premium, the Court *held*, that though it had the power to make an addition to the judgment, yet as the Plaintiff knew all the facts at the time when it was pronounced, had present to his mind the question whether he was or not entitled to any such return, and came to the conclusion that he was not, this was not a case in which the relief asked for should be granted, and dismissed the summons with costs.

In partnership cases relief is given by directing a return of premium as for partial failure of the consideration, but such relief ought not to be granted without the leave of the Court, after decree made declaring the partnership dissolved, and directing the usual accounts to be taken; and leave ought not to be given unless the circumstances are such as would have authorized the Court to give leave to bring a supplemental action.

Adjourned summons.

By an indenture dated the 1st of July, 1868, *William Edmonds* (the Plaintiff) and *William Robinson* and *William H. Robinson* (the Defendants) entered into a partnership for a term of twenty-one years. The 8th article was that the Plaintiff should pay the sum of £2500 to the credit of the partnership, but to be treated as the sole property of *William Robinson*, and to be considered as capital brought in by him. He was to be entitled to interest at 5 per cent. thereon, and was not to draw out of the capital for ten years. If, however, the Plaintiff should die within three years, *William Robinson* was to return to his representatives £1300; if he should die in the fourth year £900, and if he should die in the fifth year £500; but if *William Robinson* should die within five years, then the Plaintiff was to have no claim upon *William Robinson's* representatives. The 29th article stated that the partners were to be entitled to the net profits of the business in

the following shares: *William Robinson* to two-fourths; *William H. Robinson* to one-fourth; and the Plaintiff to one-fourth; and the 30th article contained a provision enabling *William Robinson* to retire from the firm if he should so desire, at any time after the expiration of ten years, upon notice to be given. In that event the partnership was to be determined so far as regarded him, and his share of it was to be paid or secured to him; and by the 32nd article the Plaintiff and *William H. Robinson* were thenceforth to be entitled in equal shares to the net profits. The Plaintiff paid the sum of £2500 as stipulated. Disputes having arisen between the partners, the Plaintiff, on the 10th of November, 1883, issued a writ in an action, claiming to have an account of the partnership dealings taken; a dissolution of the partnership; the appointment of a receiver; and an injunction, and on the 19th of November, 1883, a motion was on his behalf made for the appointment of a receiver. On the hearing of the motion it was agreed that it should be treated as the hearing of the action, and, after argument for all parties, judgment was given declaring the partnership dissolved as from the 16th of October, 1883, directing that the usual accounts should be taken, appointing the Plaintiff and *William Robinson* receivers, and restraining the Defendants from receiving any moneys belonging to the partnership. There was no direction given either in reference to the premium which the Plaintiff had paid, or as to the return of any part thereof. The Plaintiff, in an affidavit which he made, and which was referred to on the motion, and upon this summons, deposed to acts of misconduct on the part of the Defendants, whereby the partnership became determined, and stated the effect of the 8th article in the partnership indenture; and that the contingencies, on the happening of which he could claim the return of a portion of the premium, had not happened.

The direction given as to the taking of the accounts had to a certain extent been proceeded with before the Chief Clerk.

The Plaintiff, on the 4th of February, 1885, took out a summons asking that he might, in the taking of the accounts, be credited with the sum of £1250 in respect of the premium which he had paid on entering into the partnership, with interest upon the same at 5 per cent. from the date of the dissolution, and that *William Robinson* should be debited with a like amount.

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It was mentioned that looking at the fact that fifteen years of the partnership term of twenty-one years had expired before the writ was issued, the proportion, if any, of the premium to which the Plaintiff would be entitled to have repaid to him, would be about £700, and that he claimed the larger sum on the ground of the misconduct which he alleged against the Defendants; and it was further stated at the Bar that he was willing to accept £700, or to have an inquiry whether he was entitled to be credited with any and what sum as a return of premium.

Hastings, Q.C., and *W. Phipson Beale*, for the Plaintiff:—

The Court has full power to direct the inquiry asked for, and in the case of *Brewer* v. *Yorke* (1) such an inquiry was directed. There can be no doubt that there is jurisdiction to add to a judgment which is in the nature of a judgment for the administration of an estate. The Defendant, *William Robinson*, will be in no way prejudiced by a direction being given now, which could have been given when the judgment was pronounced. The repayment of a portion of the premium which the Plaintiff paid is a mere incident in the taking of the accounts; and in *Wilson* v. *Johnstone* (2) it was held that where a partnership is prematurely determined, and where a partner has paid a premium, he is entitled to have a return of part of the premium, except in certain cases, of which this case is not one. There is no allegation here of wilful default which requires a special case to be stated. The dissolution by order of the Court entitles the Plaintiff to an inquiry to have it ascertained whether he ought to have some return of the premium, and it is for the Defendants to shew that he is not so entitled.

They also referred to the cases of *Job* v. *Job* (3) and *Bury* v. *Allen* (4).

Kekewich, Q.C., and *Jemmett*, for the Defendants:—

This application, if there were the least foundation for it, is, it is submitted, made too late, and the Court in the exercise of its discretion will not accede to it. The claim made is an entirely new one, for the Plaintiff when he issued the writ, and when the

(1) 46 L. T. (N.S.) 289.
(2) Law Rep. 16 Eq. 606.
(3) 6 Ch. D. 562.
(4) 1 Coll. 589.

motion was made for a receiver, had not in his mind any question in regard to the premium. The return of premium is not a mere incident in the taking of the accounts. The claim made is in the nature of one for damages which should have been made, if at all, at the hearing of the motion when all the facts were as fully known to the Plaintiff as they are now, and he should not now be allowed to go into fresh accounts, very different to those which he deliberately asked for at the time when the order was made. The cases in reference to wilful default are analogous to the present, and the Court will not allow a claim as for wilful default to be added to the judgment as a mere after thought. That is allowed only when facts which would give a right to relief on that ground have, subsequently to the taking of the accounts, come to light, or have been discovered: *Lee* v. *Page* (1); *Bond* v. *Milbourn* (2); *Lyon* v. *Tweddell* (3).

[KAY, J., referred to *Brunsden* v. *Humphrey* (4).]

On the construction of the articles of partnership, the Plaintiff is not entitled to a return of any of the premium; for at the end of ten years from the date of the indenture the £2500 became the property of *William Robinson* absolutely.

Hastings, in reply:—

The term of partnership was twenty-one years, but in consequence of the misconduct of the Defendants it had to be brought to an end by a dissolution, and the consideration for the premium failed, therefore some part of the amount paid should be returned.

KAY, J. (after reading the articles of partnership, continued):—

There is a provision in the deed that at the end of ten years *William Robinson* should be entitled to withdraw the sum paid by the Plaintiff, and also to retire from the partnership. He did not retire. The partnership went on for fifteen years, and it has

(1) 30 L. J. (Ch.) 857; 7 Jur. (N.S.) 768.
(2) 20 W. R. 197.
(3) 17 Ch. D. 529.
(4) 14 Q. B. D. 141.

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been said that events happened—misconduct of *William Robinson* and his son—which entitled the Plaintiff to a dissolution of the partnership. He brought an action for that and other purposes. On a motion for the appointment of a receiver, an order was made—it being agreed that the motion should be treated as one for judgment—that the partnership should be dissolved as from the 16th of October, 1883, and the usual accounts and inquiries were directed to be taken and made, and further consideration was adjourned. The accounts have to a certain extent been prosecuted, and now the matter comes before the Court on an adjourned summons taken out by the Plaintiff, who seeks to have a direction given, that in taking the accounts he may be credited with a sum of £1250 in respect of a proportion of the premium which he paid—*i.e.* that the Court shall now adjudicate that he is entitled to a return of so much of the premium as I have mentioned, but at the bar it was said for him that he is quite willing to have his application modified by putting it into the form of inquiry whether he is entitled to the return of any and what amount of premium. The evidence in support of the summons is the same as was before the Court, when the motion was made for the appointment of a receiver—*i.e.*, the same evidence as when judgment in the action was pronounced. There has been no suggestion that any new facts have been discovered, or anything of the kind, and the evidence of the Plaintiff is that by the misconduct of the Defendants the partnership became determined, and that the contingencies on the happening of which he could claim a return of premium did not happen. I consider that to refer to the contingencies mentioned in the articles of partnership—the death of either himself, or *William Robinson* within the periods stated, and that neither having occurred, he was not entitled to have a return of premium on that ground. The materiality of that is, that not only all the facts upon which the Plaintiff now relies to induce the Court to make this addition to the relief which he sought in 1883, were known to him at that time; but that the question as to whether he was or was not entitled to have a return of premium was present to his mind when he made his affidavit. I am now asked by him to make a declaration that he is entitled to have a return of premium, or to do that which will be practically

the same, direct an inquiry whether he is or not entitled to a return of any, and if any, what part of the premium. One of the analogies relied upon for the Plaintiff was that in an action against an executor for administration of an estate, after the usual decree for taking the accounts has been made, the Plaintiff has been allowed to charge the executor as for wilful default. The old practice as to that is accurately stated in the case of *Laming* v. *Gee* (1), where it was held that where a plaintiff has obtained a judgment for administration against a defendant, he cannot maintain a subsequent action against the same defendant, in which he charges him with wilful default in the administration of the same estate, unless he has obtained the leave of the Court to bring such action. Sir *C. Hall*, V.-C., said (2): "I see nothing in the *Judicature Act* to take away or alter the old practice of getting the leave of the Court for such a purpose. That practice was a salutary and valuable one." Everybody knows that the ordinary ground for obtaining such leave was that something had been discovered since the decree was made, which entitled the plaintiff to the additional relief. In the case of *In re Symons* (3) Mr. Justice *Fry* held that when the statement of claim in an administration action against an executor alleges that he has committed wilful default, but the judgment at the trial gives no relief on that footing (the claim to such relief not being however, dismissed), the Court can at any subsequent stage of the proceedings, if evidence of wilful default is adduced, direct further accounts and inquiries to be taken and made on that footing, and I think that the Court has gone as far as this, that, although the pleadings do not contain a charge of that kind, yet if some facts in taking the accounts emerge for the first time which shew that the executors have committed wilful default, the Court, will without putting the parties to the expense of a supplemental action, give leave for an inquiry upon that footing to be made, which of course is in the nature of supplemental relief—that is, granted upon the ground which induced the Court generally to give leave to file a supplemental bill—because of new facts having been discovered since the decree was made. That which is asked now

(1) 10 Ch. D. 715. (2) 10 Ch. D. 718.
(3) 21 Ch. D. 757.

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is a very important addition to the decree indeed, for the relief asked is something in the nature of damages. At law no such relief can be obtained, but in equity, the practice being more elastic, relief is given in certain cases by directing a return of premium on the ground, not of total, but of partial failure of the consideration for which the premium has been paid; but that is most certainly relief which ought not to be granted, after an ordinary decree declaring the partnership to be dissolved, and directing the usual accounts and inquiries to be taken and made, without the leave of the Court, and leave ought not to be given unless the circumstances are such as would authorize the Court to give leave to bring a supplemental action. Is this a case coming within that rule? The first question, when leave is applied for to bring a supplemental action, is, when were the facts discovered? The answer here would be that the Plaintiff discovered them before he obtained judgment in his action. That is a very serious objection to granting leave to bring an action for supplemental relief. In an ordinary case it would be absolutely fatal, and is there any ground here to induce the Court to strain its practice in favour of the Plaintiff in the smallest degree? The Plaintiff had, as is shewn by his affidavit, present to his mind at the time when judgment was given, the question whether he was or was not entitled to a return of premium. He considered the effect of the articles of partnership, and evidently came to the conclusion that on the face of the articles he was not entitled to any return. He knew all the facts on which he now relies to induce the Court to give him leave to make this important addition to the judgment made at his instance against his partner, and at the time he did not either obtain or ask for any direction for a return of premium. It is not at all a matter incidental to the taking of the accounts, but it is an attempt to obtain additional relief against a partner in the nature of equitable damages, and it is a case in which the Court, in the exercise of its discretion, and considering the maxim "*interest reipublicæ ut sit finis litium*" should not give the leave asked, even if it has the power to give it. I do not say that it has not, for I desire that the jurisdiction of the Court should be as elastic as possible in this respect. Admitting, however, that

it has the power, this case is one in which the Court should not in the exercise of its discretion interfere in favour of the Plaintiff, and therefore I dismiss the summons with costs.

Solicitors: *Travers Smith & Braithwaite; Taylor, Son, & Humbert.*

T. F. M.

In re THOMPSON AND CURZON.

[1885 T. 190.]

Devise of Real Estate for Life and in Remainder—Marriage of Female Reversioner in 1878—*Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75), *s.* 5—*Death of Tenant for Life in* 1884—*Separate Estate.*

Testator, who died in 1875, devised his real estate to his wife for life, with remainder to his children. One daughter married in 1878, and the tenant for life died in 1884:—

Held, following the decision in *Baynton* v. *Collins* (1), that under the operation of sect. 5 of the *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), the married woman's share in the estate was her separate property, and could be disposed of by her without the concurrence of her husband.

THIS was a summons taken out under the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), by vendors of real estate, the purchaser having raised certain questions, the most important being as to the operation of sect. 5 of the *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75).

William Thompson, who died on the 31st of October, 1875, by his will made on the 18th of June, 1875, after desiring that all his just debts, and funeral and testamentary expenses, should be paid and satisfied, gave, devised, and bequeathed all his real and personal estates to his wife for her life provided that she remained his widow, and at her decease or marriage he gave, devised, and bequeathed the same to his seven sons and daughters, therein named, equally, "share and share alike, for their own use and benefit absolutely"; and then the testator said, "but if any of my children should die during my lifetime or otherwise leaving issue, such child or children, as the case may be, to have their

(1) 27 Ch. D. 604.

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father or mother's share, to be equally divided between them absolutely."

The testator's daughter *Mary*, who was interested in remainder in one-seventh of the estates, married, on the 1st of October, 1878, *Henry Rennocks*, and the testator's widow died on the 15th of April, 1884, leaving all the sons and daughters named in the will her surviving, and all of them had attained the age of twenty-one years. They offered the real estate for sale, and on the 15th of September, 1884, *Nathaniel Charles Curzon* entered into a contract to purchase it. The testator's daughter *Mary* was, it was stated at the Bar, now living apart from her husband. The purchaser raised certain questions, one being that *Mary's* husband should be made a party to the deed of conveyance, and that the deed should be acknowledged by her pursuant to the provisions of the *Fines and Recoveries Act*, but the vendors refused to comply with his request, on the ground that she was, under the operation of the 5th section of the *Married Women's Property Act*, 1882, entitled to her share of the estate as her separate property; that she could convey it by a deed unacknowledged; and that the concurrence of the husband as a party to the deed was not requisite.

The terms of the devise were discussed, and Mr. Justice *Kay* having stated that he thought the construction of the will was governed by the decision of the Court of Appeal in the case of *Olivant* v. *Wright* (1); and that the period of division of the property intended by the testator was the death of the tenant for life, held that the objection of the purchaser to the title could not be supported. The question was then argued whether the share of Mrs. *Rennocks* could be conveyed without an acknowledged deed.

Jason Smith, for the vendors:—

The important question is whether it is necessary that the husband of *Mary* should be a party to the deed of conveyance, and that the deed should be acknowledged by the wife, the title to her seventh share of the estate having accrued in possession after the death of the tenant for life in 1884, and long after the commencement of the *Married Women's Property Act*, 1882. The

(1) 1 Ch. D. 346.

Act was passed for the purpose of benefiting married women, and it is submitted that, looking at the section and at the decision of Mr. Justice *Chitty* in *Baynton* v. *Collins* (1), the wife is entitled to her share of the estate—her title before the Act being in reversion and her title after the Act being in possession—as her separate property; that an acknowledgment of the deed is unnecessary; and that the objection of the purchaser to the deed because the husband has not been made a party to it cannot be sustained.

H. Cadman Jones, for the purchaser:—

The decision in *Baynton* v. *Collins* was on an *ex parte* application, no one appearing to oppose. The husbands and wives desired to have the fund which was in Court with the least trouble and expense, and there was no contest between them. That decision cannot, therefore, be treated as a binding authority. In construing the 5th section of the Act the maxim must be borne in mind, "*Omnis nova constitutio futuris temporibus formam imponere debet, non præteritis*," and the Court will not, unless obliged to do so, construe a statute so as to take away vested rights existing at the time of its passing. A strong instance of this is found in *Helmore* v. *Shuter* (2), and the rule is stated by Lord *Mansfield* in *Couch* v. *Jeffries* (3). The Court, therefore, will lean against giving the Act such a retrospective effect as was given to it in *Baynton* v. *Collins*. But apart from any leaning it is submitted that the proper construction of sect. 5 is the other way. "Her title" is spoken of as one thing which accrues once for all. Mr. Justice *Chitty*, in fact, read the clause as saying, "all property, any title to which shall accrue to her after the commencement of this Act." It is submitted that it ought to be read thus: "her title to which shall accrue after the commencement of this Act, whether such title at the time of its accruer be vested or contingent, and whether it be in possession, reversion, or remainder." If a testator devise to *A. B.* an estate in remainder, *A. B.'s* title accrues at the testator's death. There is nothing that can properly be called an accruer of title when

(1) 27 Ch. D. 604.

(2) 2 Show. 17.

(3) 4 Burr. 2460.

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the tenant for life dies. Mr. Justice *Chitty* said that accruer of a title in possession must refer to possession falling in. With deference to him, its proper meaning is the acquiring a title to an estate, which when the right to it accrues is in possession. An observation was there made upon the words "whether vested or contingent, &c.," being put in. They may be unnecessary, but the draftsman would not unnaturally insert them for the purpose of shewing that the clause was not intended to be confined to estates in possession, or to vested estates. It would be a whimsical result that this estate, which clearly was not separate estate before the death of the tenant for life, should on the happening of that event be changed in its character. It would be also an unjust and mischievous result. Suppose that a husband before the passing of the Act mortgaged or sold his wife's reversionary interest in personalty. If *Baynton* v. *Collins* (1) be right, the wife if living at the death of the tenant for life can sweep away the rights of the mortgagee or purchaser. So again, suppose that before the *Infants Settlement Act* a settlement was made on the marriage of a female infant, by which the husband agreed to settle her reversionary interests in personal estate when they fell in. If they should fall in after the *Married Women's Property Act*, the husband and wife being both alive, she can according to *Baynton* v. *Collins* dispose of the property without regard to the settlement, unless indeed the 19th section of that Act prevents this. An analogy as to the time when a title is to be considered to accrue is furnished by *Ripley* v. *Woods* (2), where a man whose wife was entitled to personalty, subject to a life interest, became bankrupt, and obtained his certificate. After that the tenant for life died, and then the wife, leaving the husband surviving. It was held that the assignees took the property on the ground that the husband's title had accrued before the certificate. It is submitted that the decision of Mr. Justice *Chitty* will not be upheld, and that it should not now be followed.

KAY, J.:—

This question is one of considerable difficulty, and I am not sure that if it had come before me as an original one I should have held as Mr. Justice *Chitty* did in the case referred to of

(1) 27 Ch. D. 604. (2) 2 Sim. 165.

Baynton v. *Collins* (1). Looking at the words of the 5th section of the statute, that which is to accrue is a title to real or personal property. The question is whether where before the passing of the Act a vested title in reversion accrued, and then that property fell into possession after the passing of the Act, the falling into possession was an accruer in possession of title within the meaning of the 5th section. Mr. *Cadman Jones* in his very able argument has contended that the words mean that a married woman, who married before the commencement of the Act, is to have all the rights of a *feme sole* as to any property to which, after the passing of the Act, she becomes for the first time entitled. That if the interest which she so acquires is a contingent interest, or a vested interest which has not fallen into possession, she may deal with it as separate property, and that the words "her title to which in possession shall accrue," are satisfied by referring them to property the title to and possession of which accrue at the same time. Why all the words were introduced into the section it is difficult to say. I should have thought that the intention would have been satisfactorily expressed by the words "her title to which shall accrue," leaving out the words "in possession, reversion, or remainder." If I had to decide the question myself as an original one I should take more time to consider it, but I think Mr. Justice *Chitty* came to his decision after deliberation, and that as it is the only authority on the point I am bound to follow his decision, and leave it to the Court of Appeal to decide otherwise if that decision be wrong, but I must not say that I have formed a different opinion from that expressed in *Baynton* v. *Collins*. The costs of the summons must be paid by the purchaser.

The purchaser served notice of appeal, but the appeal has since been withdrawn, *Mary Rennocks* and her husband having conveyed her share by a deed acknowledged.

Solicitors: *S. W. Johnson & Son*, agents for *Fisher, Jesson, & Wilkins, Ashby-de-la-Zouch*; *R. Frederick Hill*, agent for *Cooper & Abney, Derby*.

(1) 27 Ch. D. 604.

T. F. M.

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1885
March 14, 18.

In re MUTUAL AID PERMANENT BENEFIT BUILDING SOCIETY.

Building Society—6 & 7 *Will.* 4, *c.* 32 [*Revised Ed. Statutes, vol. vii. p.* 1013]—"*Monthly Subscriptions and Deposits on Loans*"—*Borrowing Power*—*Liquidation*—*Priority of Depositors to Payment.*

A building society was established in July, 1865, under the provisions of the 6 & 7 Will. 4, c. 32, "for the purpose" as stated in rule 1, "of raising by monthly subscriptions, and deposits on loans, a fund to make advances to members of the value of their shares to enable them to erect or purchase" houses, &c. The directors received moneys on deposit from non-members, and gave certificates for them. The society went into liquidation in 1882:—

Held, that rule 1 sufficiently expressed the power to receive deposits on loans; that the persons who deposited moneys by way of loan were outside creditors and entitled in the winding-up of the society to be paid in priority to the members of all classes, including those who had given notice of withdrawal before the commencement of the winding-up.

THE *Mutual Aid Permanent Benefit Building Society* was established in July, 1865, at *Bristol*, pursuant to the statute 6 & 7 Will. 4, c. 32, and the prospectus stated that the shares were "£120 each, or £60 advanced, subscription 10*s.* per calendar month for thirteen years eleven months. Entrance fee 2*s.* 6*d.* per share. One or more sixth parts of a share may be taken." The rules had been certified pursuant to the statute.

Rule 1: "Name and objects. The society shall be called," name above set forth—"and is established for the purpose of raising by monthly subscriptions, and deposits on loans, a fund to make advances to members of the value of their shares, to enable them to erect or purchase one or more house or houses, or other freehold, copyhold, or leasehold estate, or on security of the like property to be mortgaged to the society, for the purpose of securing the monthly repayments, and other payments prescribed by the rules of the society for the time being."

Rule 2: "Entrance fees. Each member on admission shall pay an entrance fee of 2*s.* 6*d.* per share, and a proportionate part thereof for every fractional part of a share, and shall receive a scrip of each share and part of a share held by him as evidence

of his title thereto signed by two of the directors, and countersigned by the secretary. Each shareholder shall for every such scrip pay the sum of 1*s.*, and if any shareholder lose his scrip, he shall on payment of a fine of 2*s.* 6*d.*, and making a statutory declaration as to his right thereto, be entitled to a new one. Each member shall on payment of his entrance fee, also pay 1*s.* for a copy of these rules."

Rule 82 directed that a share register should be kept by the secretary in which should be entered the name and residence, and date of entrance of each member, with the number and amount of each share, and the time when the subscription commenced.

Some other rules referred to in the argument and judgment sufficiently appear therein.

On the 6th of September, 1865, at a directors' meeting, it was resolved that the directors might receive deposits of money on debentures in sums of not less than £10 or more than £100 at 5 per cent. per annum if with three months' notice of withdrawal, or at £4 10*s.* per cent. per annum if with thirty days' notice of withdrawal. Under that resolution they had since been accustomed to receive loans from persons not otherwise members, giving to each a certificate in a printed form stating the amount of the loan, the interest, and the length of notice required for repayment.

The society went into liquidation in 1882. A question was raised whether such lenders were to have priority in the winding-up of the affairs of the society over withdrawing and other members. An inquiry was in November, 1882, directed as to what moneys had been received on deposit, and as to who were members of the society. The Chief Clerk made a certificate in August, 1883, and it was directed that a summons by depositors or debenture holders of the society should be taken out asking that it might be declared that all the depositors or debenture holders named in the certificate were creditors of the society and entitled to be paid out of the assets of the society their claims in priority to the realised, withdrawal, investing, and borrowing members of the society. A summons was taken out by the three depositors who had been ordered to represent all of them, and it now came on to be heard in Court.

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society. The society was established for raising money by monthly subscriptions, and that was shewn in rule 2, and rule 7 provided that the fines for non-payment of the subscriptions and advance repayments should be of the amounts stated, and when they amounted to 10*s.* 6*d.* then it was to be considered as a loan from the defaulter and 4 per cent. charged, all clearly shewing what the society was established for, viz., to raise moneys by subscriptions of members, and that deposits could be made in advance in payment of the subscriptions. There was no express power to borrow and the applicants should not be allowed any priority of payment in respect of their debentures.

Hastings, Q.C., and *Grosvenor Woods*, for the liquidator, took no part in the argument.

Robinson, in reply.

KAY, J.:—

The law relating to building societies formed under the 6 & 7 Wm. 4, c. 32, and before the later statutes of 37 & 38 Vict. c. 42 and 38 Vict. c. 9 (the *Building Societies Acts*, 1874 and 1875) has been the subject of consideration in several recent cases, and in the absence of any contrary provisions, it may now be taken to be settled by the authority of the House of Lords: (1) that such societies may lawfully by their rules have a power of borrowing; (2) that persons lending money under such a rule are entitled on the winding-up of the society to rank as creditors against the assets in priority to the members of the society of all classes; (3) that members who have given notice of withdrawal of the entire amount which they have contributed to the society are still members for the purpose of the last rule (*Murray* v. *Scott* (1)); and (4) that such withdrawing members who have given notice before the winding-up are entitled to be paid after satisfaction of outside creditors in priority to members who have not given notice: *Walton* v. *Edge* (2).

The society which I have now to consider was formed in 1865. On the 6th of September in that year, at a directors' meeting, it was resolved that the directors might receive deposits. [His

(1) 9 App. Cas. 519. (2) 10 App. Cas. 33.

Lordship read the resolution, and that under it they had since been accustomed to receive loans as above set forth, and continued:—] The question now is whether such lenders are to have priority in the winding-up of the society over withdrawing and other members, and the answer to this depends upon whether what has been done in this respect is sanctioned by the rules of the society. The only rule relied upon as giving a power of borrowing is the first. [His Lordship read it, and continued:—] No other rule refers to or mentions a power to borrow. There is no provision as to payment of interest; as to evidence of the loan; as to repayment, or as to security. It was argued, and the objection is a cogent one, that the first rule is not for the purpose of conferring any power, but of succinctly stating the objects of the society, the mode of carrying them out being developed or defined in the succeeding rules, and that as there is no rule among them which gives power to borrow from persons not members; "deposits on loans" in the 1st rule can only mean such payments in advance by members of their subscriptions as are afterwards mentioned. The 2nd rule provided that each member on admission should pay a small entrance fee, and should receive a scrip of each share; the 3rd that "the shares should be £120 each, and for the purpose of enabling any person to take a part of a share, the shares should be divisible in six parts"; the 4th, which was headed "share subscriptions," was that "the subscription for each share shall be ten shillings per calendar month, three pounds per half year (less sixpence discount), or six pounds per annum (less two shillings and sixpence discount), payable in advance. Members shall be allowed to pay up in one sum for any number of shares, or parts of a share, according to Table 1 annexed to these rules. The subscriptions shall be payable for the term mentioned and according to the tables hereunto annexed, but subject to rule 81," which empowered the directors to pay all the preliminary and other expenses connected with the formation of the society, and to apportion them as they deemed most expedient. The subscriptions it was argued were the "deposits on loans" mentioned in the 1st rule. Turning to Table 1, I find that it provides a certain rate of payment varying from £60 the first month of the first year of membership, to £120 the last day of the eleventh month of the fourteenth year thereafter,

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society. The society was established for raising money by monthly subscriptions, and that was shewn in rule 2, and rule 7 provided that the fines for non-payment of the subscriptions and advance repayments should be of the amounts stated, and when they amounted to 10*s.* 6*d.* then it was to be considered as a loan from the defaulter and 4 per cent. charged, all clearly shewing what the society was established for, viz., to raise moneys by subscriptions of members, and that deposits could be made in advance in payment of the subscriptions. There was no express power to borrow and the applicants should not be allowed any priority of payment in respect of their debentures.

Hastings, Q.C., and *Grosvenor Woods*, for the liquidator, took no part in the argument.

Robinson, in reply.

KAY, J.:—

The law relating to building societies formed under the 6 & 7 Wm. 4, c. 32, and before the later statutes of 37 & 38 Vict. c. 42 and 38 Vict. c. 9 (the *Building Societies Acts*, 1874 and 1875) has been the subject of consideration in several recent cases, and in the absence of any contrary provisions, it may now be taken to be settled by the authority of the House of Lords: (1) that such societies may lawfully by their rules have a power of borrowing; (2) that persons lending money under such a rule are entitled on the winding-up of the society to rank as creditors against the assets in priority to the members of the society of all classes; (3) that members who have given notice of withdrawal of the entire amount which they have contributed to the society are still members for the purpose of the last rule (*Murray* v. *Scott* (1)); and (4) that such withdrawing members who have given notice before the winding-up are entitled to be paid after satisfaction of outside creditors in priority to members who have not given notice: *Walton* v. *Edge* (2).

The society which I have now to consider was formed in 1865. On the 6th of September in that year, at a directors' meeting, it was resolved that the directors might receive deposits. [His

(1) 9 App. Cas. 519. (2) 10 App. Cas. 33.

Lordship read the resolution, and that under it they had since been accustomed to receive loans as above set forth, and continued:—] The question now is whether such lenders are to have priority in the winding-up of the society over withdrawing and other members, and the answer to this depends upon whether what has been done in this respect is sanctioned by the rules of the society. The only rule relied upon as giving a power of borrowing is the first. [His Lordship read it, and continued:—] No other rule refers to or mentions a power to borrow. There is no provision as to payment of interest; as to evidence of the loan; as to repayment, or as to security. It was argued, and the objection is a cogent one, that the first rule is not for the purpose of conferring any power, but of succinctly stating the objects of the society, the mode of carrying them out being developed or defined in the succeeding rules, and that as there is no rule among them which gives power to borrow from persons not members; "deposits on loans" in the 1st rule can only mean such payments in advance by members of their subscriptions as are afterwards mentioned. The 2nd rule provided that each member on admission should pay a small entrance fee, and should receive a scrip of each share; the 3rd that "the shares should be £120 each, and for the purpose of enabling any person to take a part of a share, the shares should be divisible in six parts"; the 4th, which was headed "share subscriptions," was that "the subscription for each share shall be ten shillings per calendar month, three pounds per half year (less sixpence discount), or six pounds per annum (less two shillings and sixpence discount), payable in advance. Members shall be allowed to pay up in one sum for any number of shares, or parts of a share, according to Table 1 annexed to these rules. The subscriptions shall be payable for the term mentioned and according to the tables hereunto annexed, but subject to rule 81," which empowered the directors to pay all the preliminary and other expenses connected with the formation of the society, and to apportion them as they deemed most expedient. The subscriptions it was argued were the "deposits on loans" mentioned in the 1st rule. Turning to Table 1, I find that it provides a certain rate of payment varying from £60 the first month of the first year of membership, to £120 the last day of the eleventh month of the fourteenth year thereafter,

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being in all cases somewhat less than the member would have to pay if he made his payments by monthly subscriptions of 10*s.* Rules 75 to 78 provide for the withdrawal of members, who were to be paid according to priority of application, and to receive back the amount of their subscriptions, paying a certain sum to the contingent or guarantee fund. There are provisions in rules 53 to 61 for advances on shares to members offering security, and throughout the rules the members are spoken of as borrowing or investing members. I think the only other rule which I need specifically refer to is rule 7 as to fines, which runs thus: "The fines for non-payment of the monthly subscriptions and advance re-payments at the time appointed for payment thereof shall be as follows: For the first month per share 6*d.*, For the second and every succeeding month per share 1*s.* When the fines on a share on which no advance has been made amount to 10*s.* 6*d.*, then the value of the share at the time of the last default (exclusive of the fines) shall be considered as a loan of that amount from the defaulter to the society at 4 per cent. per annum; payable (less the fines) at any time after one calendar month's notice in writing from such defaulter; and when the amount of a share is turned into a loan, as aforesaid, the defaulter shall cease to be a member of the society." This is the only mention which I can find of a loan, other than the use of that word in rule 1, but it seems impossible to say that this satisfies the words "deposits on loans" there used. It is in fact a provision for the expulsion of a defaulting member, the value of whose share is thereupon to be considered as a loan for the purpose of regulating the future relation between him and the society. To construe "deposits on loans" in rule 1 as meaning merely the payment by members of their subscriptions in advance, would be to introduce into that rule some such words as "in manner hereinafter mentioned" which are not there. "Deposits on loans" in rule 1 are contrasted with "monthly subscriptions" as a distinct mode of raising money. If it was intended only to refer to the payment in advance of these subscriptions, the obvious phrase would have been "by subscriptions paid monthly or in advance." As to the purpose of rule 1, taking what occurs to me as an analogy, I suppose no one would doubt that if the memorandum of association of a limited company, stated one of its objects to be to raise

money by borrowing on mortgage or bond or bill of exchange, that it would be empowered to do so, though the articles were silent on the subject. I am, therefore, of opinion that the rule sufficiently expresses the power of the society to receive deposits on loans, and that such loans cannot be restricted to the payment of the subscriptions in advance. I see nothing in the rules, or in the statutes, or in the purposes of the society, which should limit this power to borrowing from members, or should prevent its being exercised in the manner which the directors have adopted. There is no ground for the suggestion which was attempted, that the moneys have been borrowed or applied for any but the legitimate objects of the society. I do not accede to the argument that each separate loan required a resolution of the directors. Another question raised was whether persons not otherwise members who have made advances to the society became members by so doing. There is no reference in any part of the rules to anything of the kind. The only advances by members mentioned in the rules are those which I have referred to, by payment in advance of their subscriptions, which of course assumes that they were members who were bound to pay their subscriptions, and the scheme of the rules seems to be that all persons who were members should be holders of shares or portions of a share in respect of which they were liable to make payments either monthly or in advance. There is nothing in the relation of a lender of money to such a society which could make him a member in the absence of a rule to that effect, and therefore I am not able to come to the conclusion that the creditors of this society for money lent are in the position of members as between them and any other creditors of the society. In my opinion persons who under the practice adopted by this society have deposited money with it by way of loan, are to all intents and purposes outside creditors, and entitled to rank as such with other outside creditors in the winding-up, in priority to the members of all classes, including those who gave notice of withdrawal before the commencement of the winding-up.

Solicitors: *Speechly, Mumford & Landon*, agents for *J. Miller, Bristol; Bolton, Robbins, Busk & Co.; William Compton Smith.*

T. F. M.

CHITTY, J.
1885
Feb. 25, 26.

HOUSE PROPERTY AND INVESTMENT COMPANY *v.* H. P. HORSE NAIL COMPANY.

[1884 H. 395.]

Pleading—Amendment by adding parties—Rules of the Supreme Court, 1883, *Order* XVI., *r.* 11.

In an action by a company, lessees for a long term of eleven houses, of which ten were unlet and in their possession when the writ was issued, and by their tenant of the remaining house as co-Plaintiff, for an injunction and damages in respect of an alleged nuisance from noise; the tenant, after delivery of the statement of claim and notice of trial, refused to go on with the action as co-Plaintiff. The other ten houses having in the meantime been let, the Plaintiff company applied at the trial for leave to amend by adding as co-Plaintiffs two of the new tenants, who consented to be added.

Application granted as being within the discretion given by Rules of the Supreme Court, 1883, Order XVI., rule 11, of allowing the names of any parties, whether plaintiffs or defendants—"whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter"—to be added.

THIS was an action by the *House Property and Investment Company*, and *William Welsford*, one of their tenants, to restrain the Defendant company from carrying on their works of nail manufacturing so as to be a nuisance or annoyance to the Plaintiffs, or the tenants or occupiers of the houses of Plaintiff company.

The Plaintiff company were lessees for a term of ninety years from Lady Day, 1874, of eleven houses in *Sterndale Street, Battersea*, at the back of which was the Defendant company's factory. In January, 1884, the writ in the action was issued in the name of the company and *William Welsford*. At this time ten of the Plaintiff company's houses in *Sterndale Street* were in hand, unlet, the only one let being that in the occupation of *William Welsford*, as their tenant.

On the 22nd of February, 1884, the statement of claim was delivered in the action, and it alleged that the noise and glare from the Defendant company's premises constituted a nuisance which had diminished the value of the Plaintiff company's property in their houses, and prevented the Plaintiff company from

letting the said houses in their possession; and that such nuisance had also interfered with the comfort and health of Plaintiff *William Welsford* and his family, and disturbed their rest at night. The relief claimed was an injunction to restrain Defendant company from carrying on the works so as to be a nuisance or annoyance to Plaintiffs or the tenants or occupiers of the houses of the Plaintiff company, and damages.

Notice of trial for the 22nd of April, 1884, was given on the 12th of March.

Since the commencement of the action every one of the eleven houses, ten of which were vacant when the writ was issued and the statement of claim delivered, had been let, so that the Plaintiff company were now in the position of reversioners as to all the houses. *William Welsford* declined to go on with the action as co-Plaintiff.

In these circumstances, two of the new tenants being willing to be joined as co-Plaintiffs, the Plaintiff company now moved at the trial for leave to amend by adding the two new tenants as co-Plaintiffs in place of *Welsford*.

Romer, Q.C., *Sutton*, and *Goyer*, in support of the application:—

Since the commencement of the action there has been a change of interest by reason of the letting of the two houses to the persons willing to be joined as co-Plaintiffs, and whose interest in possession has thus come into existence in place of that to which the Plaintiff company were entitled when the writ was issued. We are therefore entitled to an order substituting these new tenants as co-Plaintiffs in place of *Welsford*, under Rules of the Supreme Court, Order XVII., rule 4, or under Order XVI., rule 2, on the ground that there has been a *bonâ fide* mistake, or under Order XVI., rule 11, that these new tenants are persons whose presence before the Court is necessary "in order to enable the Court effectually to adjudicate upon and settle all the questions involved" in the action. Assuming for the purposes of this argument that a case of nuisance sufficient for an injunction is established, the Plaintiff company being in possession when the writ was issued, would have been entitled to an injunction in respect of these two vacant

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1885
HOUSE PROPERTY AND INVESTMENT COMPANY v. H. P. HORSE NAIL COMPANY.

houses. But having now become reversioners only, their right to restrain that which is, or may be, a temporary nuisance is gone: *Mott* v. *Shoolbred* (1) Why, then, from having since let these two houses, are the Plaintiff company to be prevented from stopping that which is a serious injury to the property, which will be the result if leave to amend be refused.

Macnaghten, Q.C., *Bigham*, Q.C., and *Speed*, for the Defendant company:—

The persons proposed to be added as co-Plaintiffs were not tenants of the property when the writ was issued. Admittedly they had nothing whatever to do with the matter, and were not persons who ought to, or could have been, joined as Plaintiffs. The case therefore is not one of *bonâ fide* mistake within Rules of the Supreme Court, 1883, Order XVI., rule 2, so as to justify the Court in giving leave to amend: *Duckett* v. *Gover* (2); *Clowes* v. *Hilliard* (3). The action being brought in respect of a nuisance which is temporary only, the Plaintiff company who are not the occupiers of the property cannot sue, nor does any theoretical diminution of the value of the property for letting purposes give them a right of action: *Jones* v. *Chappell* (4). Nor can it be said to be "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause" that these new tenants should be added as Plaintiffs within Order XVI., rule 11: *Dalton* v. *Guardians of St. Mary Abbotts, Kensington* (5).

Romer, in reply:—

In *Dalton* v. *Guardians of St. Mary Abbotts, Kensington*, the application was refused on the ground that the cause of action was injury to the original plaintiff's own property only, and that he could not be allowed to add another person as plaintiff who occupied a different house and had a separate cause of action. Here the new tenants to whom the assignment has been made *pendente lite* come forward and ask for an injunction in respect

(1) Law Rep. 20 Eq. 22.
(2) 6 Ch. D. 82.
(3) 4 Ch. D. 413.
(4) Law Rep. 20 Eq. 539.
(5) 47 L. T. (N.S.) 349.

of the very same nuisance and in respect of the very same houses in respect of which the action was brought.

In *Broder* v. *Saillard* (1), where the late Master of the Rolls gave leave to amend at the trial by adding the occupier as co-Plaintiff in an action to restrain an injury of a temporary nature, the original plaintiffs, being reversioners only, had no right to sue when the writ was issued, whereas here the Plaintiff company when the writ issued were entitled to an injunction in respect of the houses then vacant and since let.

CHITTY, J.:—

This is a very remarkable case. The Plaintiff company are the owners of certain houses, one of which at the time when the writ was issued was in the occupation of *William Welsford* as tenant of the Plaintiff company. The writ claimed damages in respect of nuisance from the Defendant company's works, and an injunction to restrain the Defendants from carrying on their works so as to be a nuisance or annoyance to the Plaintiff company, or the Plaintiff *William Welsford*, or the other tenants of the Plaintiff company. The statement of claim averred that the noise and glare caused by the Defendant company's works constituted a nuisance which had diminished the value of the Plaintiff company's property in their houses, and prevented them from letting the said houses in their possession, and that such nuisance had also interfered with the comfort and health of the Plaintiff *William Welsford* and his family. *William Welsford* declines to go on with the action, and therefore the Plaintiff company cannot sustain the action in respect of that particular house, as *Jones* v. *Chappell* (2) shews that the Plaintiffs in an action for the purpose of restraining a nuisance of a temporary nature must be the occupiers and not merely the reversioners of the property affected by the nuisance. The Plaintiff company's case in respect of this particular house is gone; but as to the other houses, two have been let *pendente lite*, and the Plaintiff company say that the new tenants are willing to be joined as co-Plaintiffs. One of the rules relied upon in support of the application is Order XVI., r. 2, which provides that "where an action has been commenced in the

(1) 2 Ch. D. 692, 694. (2) Law Rep. 20 Eq. 539.

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name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake," order any other person to be substituted or added as plaintiff. Here there has been no mistake, and the rule does not apply, because, when the writ was issued the persons now proposed to be joined as Plaintiffs, not being in existence as tenants, had no title to relief.

It is admitted on behalf of the Defendant company, for the purposes of this argument, that in respect of the other houses the Plaintiff company had a right to an injunction and damages. Two at least of those houses have been let *pendente lite*, and it is said that inasmuch as the company has alienated the property, and the occupiers are the persons affected by the nuisance, the company's right to sue in respect of these two houses has ceased. I ought not, however, to be astute in preventing the Plaintiff company, who have assigned *pendente lite*, from having the question as to these two houses fairly raised. Order XVI., rule 11, gives to the Court a wide discretion as to allowing an amendment at any stage of the proceedings "by adding the names of any parties, whether as plaintiffs or defendants, who ought to have been joined." That part of the rule has no application to this case, as these two persons are not persons who ought to have been joined when the writ was issued. But then follow these words: "or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." This is a matter of discretion in the Court, and the late Master of the Rolls, who took great part in settling the practice, discussed the question in *Broder* v. *Saillard* (1). After some argument, though this is not reported at length, the Master of the Rolls gave leave to amend the bill by adding the occupier as co-plaintiff; and in his judgment (2), in reference to the objection that the owners of the house, the nuisance being a temporary one, could not be properly plaintiffs, he says, "Thinking, as I do, that the objection was a valid one, according to the cases of *Mott* v. *Shoolbred* (3)

(1) 2 Ch. D. 692. (2) 2 Ch. D. 698.
(3) Law Rep. 20 Eq. 22.

and *Jones* v. *Chappell* (1), I gave the plaintiffs leave to amend by adding as co-plaintiff the tenant of the house, which they did." In a case, therefore, where the nuisance was of a temporary character, and the tenant was not joined as a party in the first instance, the late Master of the Rolls gave leave to add him as a co-plaintiff. The only distinction in this case is that the persons proposed to be added as co-Plaintiffs were not tenants at the time when the writ was issued. The other case relied on by the Defendants was *Dalton* v. *Guardians of St. Mary Abbotts, Kensington* (2). That was the case of a private nuisance (from a proposed small-pox hospital) sustained by *Dalton* in his capacity of individual owner. For some reason or other *Dalton* wished to leave the neighbourhood, and applied that an owner of property practically sustaining the same injury might be joined as plaintiff in the action. After argument, the Divisional Court refused to allow this amendment to be made. The distinction between that case and this was that the owner proposed to be added as plaintiff was owner of a distinct property, whereas here the persons proposed to be added as co-Plaintiffs were not proposed to be added in respect of property not originally comprised in the action, the claim of the Plaintiff company relating to these two houses as well as the other property. I think it right to allow the amendment to be made on the usual terms of the Plaintiff company paying the costs of the day, with liberty to the Defendant company to put in an amended statement of defence.

Solicitors: *Gover & Son; Lindsay, Mason, Greenfield, & Mason.*

(1) Law Rep. 20 Eq. 539. (2) 47 L. T. (N.S.) 349.

F. G. A. W.

CHITTY, J.

1885

March 21, 23.

NIXON *v.* VERRY.

[1884. N. 664.]

Forfeiture—Insolvency—Bankruptcy Act, 1869, *s.* 126—*Composition.*

Presentation by a firm of a petition for liquidation under the *Bankruptcy Act*, 1869, followed by acceptance by the creditors of a composition, operates as a forfeiture of an interest limited in 1862 to the use of *A.*, who was a member of the firm, during his life, "or until he should be outlawed or declared bankrupt, or become an insolvent within the meaning of some Act of Parliament for the relief of insolvent debtors."

Special case.

By indenture of the 27th of August, 1862, *Mary Verry* granted the hereditaments therein comprised to the Plaintiffs, *Nixon* and *Baylis*, their heirs and assigns, to the use of the Defendant, *G. W. Verry*, during his life, or until he should be outlawed or declared bankrupt, or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors, or should assign, charge, or incumber his life interest in the said premises or some part thereof, or should do or suffer something whereby the same or some part thereof might, if belonging absolutely to him, become vested in some other person or persons; and after the determination of the estate therein limited to the use of the Plaintiffs upon trusts for the benefit of the Defendant's children.

On the 8th of May, 1882, the firm of *Baylis & Verry*, in which the Defendant was and is a partner, presented their petition under the *Bankruptcy Act*, 1869, for liquidation of their affairs by composition or arrangement with their creditors. At the first meeting of creditors held under the petition on the 25th of May, 1882, a composition of 7*s.* 6*d.* in the pound was offered by the debtors, and accepted by the statutory majority at the adjourned meeting held on the 1st of June, and duly registered on the 13th of June, 1882, and such composition had been duly paid.

Since the date of the petition the Defendant had been in receipt of the rents of the property.

The question for the opinion of the Court was whether under the limitations of the indenture of the 27th of August, 1862, and the above-mentioned circumstances, the Defendant had forfeited his life interest in the hereditaments comprised in the settlement, and if so, from what date.

Rowden, for the Plaintiffs:—

By presenting a petition for liquidation under the arrangement clauses of the *Bankruptcy Act*, 1869, and the acceptance of a composition by the creditors, *G. W. Verry* became an insolvent debtor within the meaning of the provision in the deed of 1862, and a forfeiture of his life interest has taken place: *Billson* v. *Crofts* (1); *In re Amherst's Trusts* (2).

Vernon R. Smith, for *G. W. Verry*:—

The Defendant has not "become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors." Although a composition with creditors was effected by presenting a petition in bankruptcy for liquidation by arrangement, a composition with creditors did not involve technical insolvency, nor has there been any *cessio bonorum* so as to cause a deprivation of the property: *Montefiore* v. *Enthoven* (3); *Lloyd* v. *Lloyd* (4). Outlawry and declaration of bankruptcy, which both operate as a forfeiture of property, are placed together in the clause of forfeiture in distinction from mere inability to pay debts; for when a man is adjudged to be outlawed or put out of the protection of the law, "he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise, and his property is forfeited to the Crown:" *Stephen's* Comm. (5).

[CHITTY, J., referred to *Archbold's* Practice (6): "The party outlawed forfeits to the Crown his personal chattels, property, debts and choses in action presently, and his real chattels and the profits of his land immediately upon office found."]

Though the land may not be forfeited until office found his

(1) Law Rep. 15 Eq. 314.
(2) Ibid. 13 Eq. 464.
(3) Ibid. 5 Eq. 35.
(4) Law Rep. 2 Eq. 722.
(5) 9th Ed. vol. iv. p. 385; vol. iii. p. 515, n.
(6) 13th Ed. p. 1081.

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goods and chattels are forfeited immediately. The intention of the settlor was that the property should only go over upon some act which amounted to an alienation. Here there was merely an inchoate proceeding of insolvency, and nothing equivalent to alienation. Moreover, the composition was effected by the firm of which the Defendant was a member, and therefore he was not personally insolvent, and certainly did not become an insolvent debtor within the meaning of any Act for the relief of insolvent debtors. He distinguished *Billson* v. *Crofts* (1) and *In re Amherst's Trusts* (2).

Rowden, in reply.

CHITTY, J. :—

The question is whether the interest of the Defendant has ceased under the clause of forfeiture contained in the settlement. What has happened is that the Defendant is a member of a firm, which firm has presented a petition for liquidation under the *Bankruptcy Act*, 1869, on the face of which petition it is stated that the firm was unable to pay its debts. A composition was accepted under sect. 126 of the *Bankruptcy Act* of 1869; and the result is that the Defendant, who has voluntarily declared himself unable to pay his debts, has obtained the benefit of the Act of 1869. Although there has been no *cessio bonorum* he has been relieved from payment of his debts in full. In my opinion it does fall within the clause of forfeiture. In 1862 when the settlement was executed the Acts for relief of insolvent debtors had been repealed by the *Bankruptcy Act* of 1861, which was afterwards repealed by the Act of 1869, and in my opinion the Defendant has become an insolvent debtor within the meaning of these two Acts. It is through the medium of the *Bankruptcy Act* that he has been able to escape from the consequences of insolvency and has obtained the benefit of relief from his debts; and it seems to me therefore that the event mentioned in the clause of forfeiture has happened. It has been argued, however, that having regard to the words "outlawed or declared bankrupt or become an insolvent debtor within the meaning of some Act for the relief of insolvent

(1) Law Rep. 15 Eq. 314. (2) Law Rep. 13 Eq. 464.

debtors," the clause involved an actual *cessio bonorum*. I cannot adopt that argument, for I have a strong impression that outlawry does not by itself work a forfeiture, but that, as stated in the passage I referred to from *Archbold*, there must be office found. It must be declared that in the events that have happened there has been a forfeiture of the life interest as from the presentation of the petition.

CHITTY, J. 1885 NIXON v. VERRY.

Solicitors: *Lovell, Son & Pitfield.*

F. G. A. W.

In re R. A. PARKER AND OTHERS.

CHITTY, J. 1885 *March* 9, 10, 24.

Taxation—Solicitors' Charges—Perusing Abstracts—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order (containing Scales of Charges) of August*, 1882, *Sched. II.*

Upon the construction of Sched. II. of the General Order (containing scales of charges) made in pursuance of the *Solicitors' Remuneration Act*, 1881, abstracts of title are not included in the words "deeds, wills, and other documents," the charge for perusing which is therein fixed at 1*s.* per folio; but the old scale of 6*s.* 8*d.* for perusal of every three brief sheets of eight folios each remains unaltered.

ADJOURNED SUMMONS for review of taxation.

Messrs. *Sharpe, Parkers, & Co.* were employed by Captain *Atherley* and others as their solicitors in reference to an exchange of freehold hereditaments and the surrender of leasehold hereditaments at *Camberwell* under agreements made in June, 1883, with the School Board for *London*.

On the 20th of November, 1883, Messrs. *Sharpe, Parkers, & Co.* delivered their bill of costs.

The bill was referred to taxation by order of the 6th of December, 1883, and the Taxing Master having disallowed the sum of £5 16*s.* 4*d.* in respect of a charge of £8 3*s.* for perusal of abstract, the question raised by this summons was whether the charge for perusing an abstract should be 1*s.* per folio, or 6*s.* 8*d.* for three brief sheets (the old charge in force before the General Order of August, 1882, in pursuance of the *Solicitors' Remuneration Act*,

CHITTY, J. 1885 *In re* R. A. PARKER AND OTHERS.

1881 (44 & 45 Vict. c. 44). The material part of this order was as follows:—

"SCHEDULE II.

"INSTRUCTIONS FOR AND DRAWING AND PERUSING DEEDS, WILLS, AND OTHER DOCUMENTS.

Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable. In ordinary cases, as to drawing, &c., the allowance shall be

For drawing	2*s.* per folio.
For engrossing	8*d.* „
For fair copying	4*d.* „
For perusing	1*s.* „

ATTENDANCES.

	s.	*d.*
In ordinary cases	10	0

In extraordinary cases the Taking Master may increase or diminish the above charge, if for any special reasons he shall think fit.

ABSTRACTS OF TITLE (WHERE NOT COVERED BY THE ABOVE SCALES).

	s.	*d.*
Drawing each brief sheet of 8 folios	6	8
Fair copy	3	4

JOURNEYS FROM HOME.

* * * * * *

In extraordinary cases the Taking Master may increase or diminish the above allowance, if for any special reasons he shall think fit."

By their objections to such disallowance the solicitors submitted that an abstract was a document within the meaning of Sched. II., and that the perusal of an abstract being one of the most onerous and responsible of a solicitor's duties, was a duty for which he should be remunerated at the same rate at least as for the perusal of an ordinary deed. The mention of the charge for drawing and copying abstracts in Sched. II., which was at the old rate, shewed that the meaning of the Order was that perusing an abstract should not be left to be governed by the rates prevailing before the Order, but by the rates thereby provided for perusal of "deeds, wills, and other documents."

By his certificate the Taxing Master stated as follows:—

"The point is whether, having regard to the context and the subsequent mention made of drawing and copying abstracts, abstracts are to be considered, as for the purpose of perusal only, as coming within the terms of 'other documents,' or whether

these words could apply only to other documents of the same nature as deeds and wills, or at least only to other documents in respect of which the fee for drawing is 2*s.* per folio, which would appear to be the natural construction of the rule. The allowance for drawing deeds, wills, &c., is an increased fee of 2*s.* instead of 1*s.*, and the allowance for perusal is raised from 5*s.* for every fifteen folios to 1*s.* per folio, the allowances for copying and engrossing remaining the same as before. The allowances for ordinary attendances and journeys are also increased, whilst that for drawing and copying abstracts remains as it was in practice before. So that Sched. II., though in certain cases it gives no more than the old allowances, and leaves some matters, such as letters and attendances other than ordinary ones, unnoticed, yet is generally in favour of the solicitor.

"It seems, however, to be hardly logical in the case of abstracts only to allow a larger fee for perusing than for drawing, viz., 8*s.* for perusing against 6*s.* 8*d.* for drawing; and on the reason of the thing larger charges are allowed for drawing and perusing deeds, wills, &c., because they are shorter, owing to numbers of clauses, provisoes, and covenants in common form being omitted. This would not apply to abstracts, where these clauses and provisoes were always referred to in short. So it seems to me that, whether having regard to the words of the schedule or to the sense of the matter, the remuneration as to the perusal of abstracts is not altered by Sched. II., but remains as before, 6*s.* 8*d.* for every three sheets of eight folios."

The solicitors had taken out a summons in Chambers that their objections to the taxation might be allowed, and that it be referred back to the Taxing Master to vary his certificate accordingly.

Macnaghten, Q.C., and *W. P. Beale*, in support of the summons.

No counsel appeared on the other side.

CHITTY, J.:—

The question on this summons is as to the meaning of the term "other documents" used in Sched. II. of the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881. It has been contended on behalf of the solicitors that these words include

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In re R. A. PARKER AND OTHERS.

abstracts, and consequently that the solicitor is now entitled to 1*s.* per folio for perusing abstracts instead of the old charge of 6*s.* 8*d.* for three brief sheets of eight folios each. The schedule is referred to in rule 2 (*c*) in this way: "And in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Sched. I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Sched. II. hereto." On the face of it Sched. II. does not contain an exhaustive statement of the system as altered by the rule itself, but merely contains certain alterations which are made in terms. It is noticeable that in rule 2 (*c*) many documents are mentioned, "settlements, mining leases or licenses, or agreements therefor, reconveyances, transfers of mortgage, or further charges, assignments of leases not by way of purchase or mortgage."

Now, turning to the schedule itself, the heading of that, which is not in form but in substance the first part of Sched. II., speaks of "Instructions for and drawing and perusing deeds, wills, and other documents." I should say, speaking roughly, the term "other documents" is sufficient to include abstracts. But then there is this consideration, which was probably in the mind of those who framed the rules, that an abstract is rather an epitome of a document than a document itself, and I think from reading the other parts of the rules that this becomes apparent. But the schedule is plainly, as I have intimated, divided into two parts. That is shewn by the fact that the note which I am about to read occurs before the part which deals with abstracts of title: "In extraordinary cases the Taxing Master may increase or diminish the above charge, if for any special reasons he shall think fit." And then comes a new heading: "Abstracts of Title (where not covered by the above Scales)," and those words "where not covered by the above scales" refer undoubtedly to the scale scheduled. Then at the end of that, which I say is necessarily a second part of this Sched. II., I find a note similar to the note which I have just read. It appears to me on the true construction of Sched. II. that "abstracts" is a title used independently of, and intended to be in contrast with, "other documents." The result is that abstracts of title are dealt with specifically, and that the old practice remains except so far as an alteration has been

expressly effected; and I think, to answer the question with which I started, that the term "other documents" on the true construction of this schedule does not include abstracts of title. It was well said that one of the objects of the new rules was to do away with the old system of remunerating solicitors simply according to the length of the documents that they drew or perused, and that as deeds under the new Conveyancing Statutes would be shorter than formerly, abstracts would be shorter also, and it would follow the solicitor had to employ greater mental labour in reading not merely the deeds but in reading the abstract. There is some force undoubtedly in that observation, but in practice, though solicitors could read the abstracts, and do sometimes advise their clients themselves personally on the matter, it is generally found (I do not say it is the universal rule) that solicitors employ counsel, and do not undertake the responsibility of advising on a title except of the simplest kind. There is therefore some reason for saying that the framers of the rules did not intend to increase the remuneration of the solicitor for work which is rather of a mechanical kind, for merely reading through the abstract before sending it to counsel, from 6*s.* 8*d.*, as it stood at the time when these rules were made, to 24*s.*, as it would be if the contention of the solicitors in this case is held to be correct. One further observation on the rules, which is this, that I find some of the charges remain as they were at the time when the rules were passed, though the amount of remuneration is stated against the particular head. How that occurred I cannot exactly explain. Possibly there was some discussion about these particular heads, and in the result the old charges were continued. As the matter appeared to be one of some importance to solicitors, I requested the Taxing Masters to make a report to me on the subject, and I find that seven of them, as against one the other way, have in the taxation of bills acted upon the opinion which I have myself arrived at. I have arrived at my opinion independently of their report, but at the same time their report has given me valuable assistance in the matter. I therefore hold in this case that the Taxing Master is right.

Solicitors: *Sharpe, Parkers, Pritchard, & Sharpe.*

F. G. A. W.

CHITTY, J.

1885

April 1, 16.

In re RAILWAY SLEEPERS SUPPLY COMPANY.

Time—Computation of—Interval—Company—Special Resolution—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51 [*Revised Ed. Statutes, vol. xiv., p.* 214].

The interval of not less than fourteen days which under sect. 51 of the *Companies Act*, 1862, is to elapse between the meetings passing and confirming a special resolution of a company is an interval of fourteen clear days, exclusive of the respective days of meeting, and therefore a special resolution for reduction of capital passed at a meeting held on the 25th of February, 1885, and confirmed at a meeting held on the 11th of March, 1885, was held to be bad.

MOTION.

At an extraordinary general meeting of this company duly convened and held on the 25th of February, 1885, a special resolution was passed for the reduction of the capital of the company, and at another extraordinary general meeting convened and held on the 11th of March, 1885, that resolution was confirmed.

On the 17th of March, 1885, the company presented a petition asking for the sanction of the Court to the proposed reduction of capital, but doubts having been entertained whether the provisions of the 51st section of the *Companies Act*, 1862, with regard to the interval of time to elapse between the meetings passing and confirming a special resolution had been complied with, this was a motion on behalf of certain Respondents to the petition, who were also shareholders, that all further proceedings under the petition might be stayed on the ground that the resolution was not passed and confirmed as a special resolution at such interval as is required by sect. 51 of the *Companies Act*, 1862.

Sect. 51 enacts that "A resolution passed by a company . . . . shall be deemed to be special whenever a resolution has been passed . . . . at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed . . . . at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month, from the date of the meeting at which such resolution was first passed."

Ingle Joyce, in support of the motion :—

The resolution is bad. The confirmatory meeting was held at an interval of thirteen days only. The term, "An interval of not less than fourteen days," means that there must be an interval of fourteen clear days: *Lester* v. *Garland* (1); *Reg.* v. *Justices of Shropshire* (2); *Blunt* v. *Heslop* (3); *Webb* v. *Fairmaner* (4); *Young* v. *Higgon* (5); *Chambers* v. *Smith* (6).

H. B. Buckley, for the company :—

The words of the section are not "after an interval," but "at an interval," and I submit that the terms of the section have been complied with, and that the resolution must be held to be good.

CHITTY, J. :—

The question in this case is, whether the second or confirmatory meeting was not held too soon. The material words of the 51st section on which the question turns are that the subsequent general meeting is to be held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution is first passed, that is, from the date of the first meeting. In the case before me the first meeting was held on the 25th of February and the second meeting on the 11th of March, therefore, excluding the days of the meetings, only thirteen clear days elapsed between the two meetings.

The general rule of law in the computation of time is that fractions of a day are not reckoned. Sir *William Grant* in *Lester* v. *Garland* says (7), "Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act done in the compass of it, is no more referable to any one, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to have passed, until the day is passed." There are certain exceptions to the general rule which I have mentioned, but they have no application here. The

(1) 15 Ves. 248.
(2) 8 Ad. & E. 173.
(3) Ibid. 577.
(4) 3 M. & W. 473.
(5) 6 M. & W. 49.
(6) 12 M. & W. 2.
(7) 15 Ves. 257.

CHITTY, J. 1885 *In re* RAILWAY SLEEPERS SUPPLY COMPANY.

section speaks of "from the date" of the first meeting. The date is equivalent to the day on which the meeting was held, the whole day being regarded as a point of time. Lord *Mansfield* in his well-known judgment in *Pugh* v. *Duke of Leeds* (1) says, "Date does not mean the hour or the minute, but the day of delivery, and in law there is no fraction of a day." The day of the death of the testator, which is equivalent here to the day of the first meeting, was not reckoned by Sir *William Grant* in his well-known decision in *Lester* v. *Garland* (2), where a bond had to be given within six months after the testator's decease. The 51st section states that the subsequent or second meeting is to be held "at an interval of not less than fourteen days or more than a month." The word "at" means after the interval, or at some time after the interval, prescribed by the other part of the section. The word "at" refers grammatically rather to a point of time than a period. It is possible but not very likely that the Legislature considered that there might be successive adjournments of the second or subsequent meeting so as to cover the whole or a large portion of the month. That is not very probable. The object of the enactment was to limit the earliest and the latest day at which the second meeting was to be held. It was considered apparently proper to strike a mean so that the period should neither be too short nor too long. The interval "of not less than fourteen days" was allowed to give reasonable time for deliberation, and to prevent undue haste or surprise, and to afford to the shareholders who might be present at the first meeting, and also to those who might not think fit or might not be able to attend it, time for reflection and consideration, and to make arrangements to enable them to attend the second. The period of a month (which according to the statute of the 13 & 14 Vict. c. 21, s. 4, means a calendar month) was given lest the matter should be forgotten, or be deemed to have dropped, and to bring about a decision while the matter was comparatively fresh in the minds of the members. The grammatical question is raised whether the words "nor more than a month," should be read in connection with the word "interval," so that the sentence should run as if the word "of" were inserted after "nor;" or whether the

(1) 2 Cowp. 714, 720. (2) 15 Ves. 248.

words "nor more than a month," ought not to be read in connection with the word "at," so that the sentence would run and "at a time not more than one month" from the date of the first meeting. Is the interval referred to, first, the whole period between the date of the first meeting and the expiration of the month, or secondly, only the earlier, or thirdly, only the later portion of that period? It is not material, to my mind, to answer these questions beyond saying that it is plain at all events that the statute prescribes the interval which is to elapse between the date of the first meeting and the earliest time when the second meeting can be held. "An interval of not less than fourteen days" is equivalent to saying that fourteen days must intervene or elapse between the two dates. Lord *Tenterden's* test, which is cited with approval by Lord *Wensleydale* in *Webb* v. *Fairmaner* (1) and *Young* v. *Higgon* (2) was to reduce the time to one day. Now supposing the statute had said at an interval of not less than one day; if the first meeting were held say on the 1st of January, the second meeting could not properly be held on the 2nd of January, for one day must intervene, therefore the 3rd of January would be the earliest day, and adding thirteen more days to make up the fourteen the second meeting could not be held before the 16th. In the case of *Reg.* v. *Justices of Shropshire* (3) the statute required that notice of the grounds of appeal was to be given, fourteen days at least, before the first day of the sessions, and it was decided that the fourteen days at least meant fourteen clear days. *Littledale*, J., says (4): "We must abide by what has been already decided, though it appears to me that a day is a day whether 'at least' be added or left out." In *Chambers* v. *Smith* (5) the words were "not being less than fifteen days." The Court considered its judgment, and then decided that one of the days was to be reckoned inclusive, and the other exclusive, but not being subsequently satisfied with that decision, the matter was reconsidered; and the Court held that the words "not being less than fifteen days," meant fifteen all days or clear days. In *Young* v. *Higgon* (6) a calendar month's notice was required to

(1) 3 M. & W. 473, 477.
(2) 6 M. & W. 49, 54.
(3) 8 Ad. & E. 173.
(4) 8 Ad. & E. 175.
(5) 12 M. & W. 2.
(6) 6 M. & W. 49.

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be given, and the Court held that the first day must be excluded from the reckoning. *Alderson*, B., in his judgment said (1): "Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to ensure to him the whole of that space of time." In *Blunt* v. *Heslop* (2), which turned on 2 Geo. 2, c. 23, the statute which then related to solicitors, under which an attorney was not entitled to commence an action for his fees until the expiration of one month or more after he had delivered his bill, it was held that time was to be reckoned exclusively of the day on which the bill was delivered and the action brought; on the same principles as those which were stated in the case of *Young* v. *Higgon* (3). These cases are not, in my opinion, distinguishable from the case before me; which, as I have said, is that there must be an interval of not less than fourteen days. That means fourteen clear days; and as *Littledale*, J., said in *Reg.* v. *Justices of Shropshire* (4), I do not see any distinction between "fourteen days" and "at least fourteen days." I must come therefore to the conclusion that the resolution is bad. Probably no question has more exercised the minds of Judges in former times than the question as to the proper mode of computing time. Lord *Mansfield's* judgment in *Pugh* v. *Duke of Leeds* (5) and Lord *Wensleydale's* judgment in the case of *Chambers* v. *Smith* (6), to which I have already referred, are excellent illustrations of what I have said. It is no wonder to my mind that persons who do not read statutes with care and have not legal knowledge at their finger's ends should make a mistake in such a matter as this, but it is better in these cases to adhere to settled rules, and I consider that the rule now is settled, and that I am not at liberty to depart from what has been already laid down.

The result therefore is that there must be a stay.

Solicitors: *Wansey & Bowen; Harries, Wilkinson, & Raikes.*

(1) 6 M. & W. 54.
(2) 8 Ad. & E. 577.
(3) 6 M. & W. 49.
(4) 8 Ad. & E. 175.
(5) 2 Cowp. 714.
(6) 12 M. & W. 2.

G. M.

In re MERCHANT TAYLORS COMPANY.

CHITTY, J.

1885 ~~ *April* 17.

Sale under Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18) [*Revised Ed. Statutes, vol. ix., p.* 628]—*Reinvestment of Proceeds—Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order of August*, 1882, *Sch. I., pt.* 1, *rule* 11—*Scale Charges.*

Where land has been compulsorily taken by a railway company in exercise of its statutory powers, and the proceeds of sale have been paid into Court and subsequently reinvested in land, the costs incurred in such reinvestment may be charged for according to the scale fixed by the *Solicitors' Remuneration Act*, 1881.

The exception contained in rule 11 of the General Order, Sch. I., pt. 1, does not apply to such costs.

ADJOURNED SUMMONS.

Certain lands belonging to the *Merchant Taylors Company* having been taken by the *Great Eastern Railway Company* and other railway companies in exercise of their statutory powers, the proceeds of sale were paid into Court under the provisions of the *Lands Clauses Consolidation Act* and were afterwards reinvested in the purchase of other lands for the *Merchant Taylors Company.*

The solicitor to the *Merchant Taylors Company* made out his bill of costs according to the scale charge fixed by the *Solicitors' Remuneration Act*, 1881, and on taxation these charges were objected to on the ground that the scale charge did not apply as coming within the exception contained in rule 11 of Schedule I., part 1, of the General Order, which directs that in case of sales under the *Lands Clauses Consolidation Act*, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply.

The Taxing Master held that the solicitor of the *Merchant Taylors Company* was entitled to charge according to the scale fixed by the General Order, and the railway companies thereupon took out a summons to review his taxation which was adjourned into Court.

Macnaghten, Q.C., and *Smart*, in support of the summons:—

This is a sale and purchase under the *Lands Clauses Act*, and

CHITTY, J. comes within the exception mentioned in the latter part of rule 11, and the scale does not apply.

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In re MERCHANT TAYLORS COMPANY.

Romer, Q.C., and *Hood*, for the *Merchant Taylors Company* :—

The question here is with regard to the purchaser's charges; the vendor is outside the taxation altogether, and there is no question about paying his charges. We submit the Taxing Master is right.

CHITTY, J.:—

The question is whether this case falls within the exception at the end of the 11th rule of the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881:—[His Lordship read the clause.] The *Merchant Taylors Company's* land has been taken by several railway companies, and the purchase-moneys, as in the ordinary case, have been paid into Court, and then an application is made and sanctioned by the Court for investment of the moneys in the purchase of other land. The question is with reference to the charges of the *Merchant Taylors Company* on the purchase that is now being made. The *Merchant Taylors Company* are the purchasers and not the vendors. The costs of this purchase fall under the *Lands Clauses Consolidation Act*, and must no doubt be paid by the railway company.

Now the question is whether there is enough in the clause that I have read at the end of the 11th rule to exclude the scale, because the scale applies unless it is excluded. The language is, "in case of sales under the *Lands Clauses Consolidation Act*, or any other public or private Act under which the vendor's charges are paid by the purchaser." It is argued that the words "vendor's charges are paid by the purchaser" do not apply to the *Lands Clauses Consolidation Act*, so that it is said that a transaction which arises in not only the sale but the purchase which takes place under the *Lands Clauses Consolidation Act* is also included within the exception. That appears to me to be a misreading of the clause, because I think the words "under which the vendor's charges are paid by the purchaser," are words which apply not only to the other Acts which are mentioned but also to the *Lands Clauses Consolidation Act*, and the reading of this proviso therefore

is, in case of sales under the *Lands Clauses Consolidation Act* under which the vendor's charges are paid. But the question here is not with regard to the payment of the vendor's charges, but it is with regard to the payment of the purchaser's charges, that is the charges of the solicitor of the *Merchant Taylors Company*. The vendor is some third party outside the taxation altogether. There is no question about paying his charges at all; he has to bear his own as in the ordinary case. It appears to me that those words are material words, as shewing that the proviso at the end of the 11th rule has not this large and extensive signification attributed to it by the railway company, who have asked me to review the Taxing Master's certificate, but has the more restricted meaning which the Taxing Master himself has taken. I hold, therefore, the Taxing Master to be right.

Solicitors: *W. F. Fearn; A. G. Parson.*

G. M.

NORTH, J.

1885

Feb. 23, 24.

JAMES *v.* COUCHMAN.

[1883. J. 1008.]

Voluntary Settlement—Rectification—Power of Revocation.

By a voluntary settlement property was assigned to trustees in trust for the settlor for life, remainder for any wife he might marry for life, with remainders to his issue, and in default or failure of issue in trust for his paternal next of kin :—

Held, that though a settlement was proper to be made, and though the settlor understood the terms of this settlement, yet as his attention was not drawn to the fact that he might have had a power of disposition over the property in default or failure of issue, such a power ought to be given, and the settlement must be rectified accordingly.

THE Plaintiff, *C. G. S. James*, was under the will of his grandfather, *W. James*, entitled to a reversion in Rs.50,000 and in part of *W. James's* residuary estate. The Plaintiff had been extravagant, and his conduct had been such that in the opinion of the Court it was right that he should be protected against himself. Accordingly, shortly before he came of age, he, at the suggestion of his mother, was invited to stay with his aunt and her son, a clergyman named *S. Peshall*. They had consulted Mr. *T. B. Couchman*, who had been for forty years solicitor to the family, and after several interviews between the Plaintiff and Mr. *Couchman* a deed of settlement was prepared and was executed about a fortnight after the Plaintiff came of age. The deed was dated the 11th of December, 1875, and was made between the Plaintiff of the one part and *T. B. Couchman* and *J. L. Twynam* of the other part, and thereby, in consideration of the natural love and affection borne by the Plaintiff towards his aunts and his cousin (then the only next of kin of *W. James*) the Plaintiff assigned the said sum of Rs.50,000 and his interest in the residuary estate unto *Couchman* and *Twynam* upon trust to invest as therein mentioned when the same should fall into possession, and to hold the same upon trust as to £2000, part thereof, for the Plaintiff, and as to the residue upon trust for the Plaintiff during his life or until bankruptcy as therein mentioned, and afterwards on trust for any wife whom he might marry, and after her decease upon trust for his issue as

therein mentioned. And it was declared that if there should be no issue of the Plaintiff in whom the trust funds should become absolutely vested under the foregoing trusts the trustees should stand possessed thereof in trust for the person or persons on the part of the Plaintiff's father who, under the statutes for the distribution of the estates of intestates, would on the decease of the Plaintiff have been entitled thereto if he had died intestate leaving paternal relations only.

The Plaintiff, *C. G. S. James*, brought this action against the trustees of the settlement and against *Peshall*, alleging that the deed was prepared without any instructions on his part and signed by him under the influence of *Couchman* and *Peshall*; and claiming that the deed might be rectified by giving him an absolute power of disposition over the trust funds in default or failure of his issue and subject to the interest of his wife therein. He also claimed to have a sale of his reversionary interest in the £2000 to *Peshall* in the year 1879 set aside.

Warmington, Q.C., and *R. C. Dobbs*, for the Plaintiff:—

This settlement was made by a young man just come of age, and under the influence of his relations, and cannot stand.

[NORTH, J.:—This is not the case made on the statement of claim.]

At all events, the Plaintiff must have a power of revocation in the event of his leaving no issue: *Everitt* v. *Everitt* (1); *Wollaston* v. *Tribe* (2). The Plaintiff had no independent advice, and did not know what he was doing.

Witnesses on both sides were examined.

Barber, Q.C., and *Kenyon Parker*, for all the Defendants:—

The question is not whether a power of revocation would not have been a proper power to insert, but whether the Plaintiff did not know what he was doing, and knew that there was no such power: *Dutton* v. *Thompson* (3). The Court is asked after several years to alter a settlement to the possible injury of parties who

(1) Law Rep. 10 Eq. 405. (2) Law Rep. 9 Eq. 44.
(3) 23 Ch. D. 278.

NORTH, J. 1885 JAMES v. COUCHMAN.

are not and cannot be brought before the Court. It is clear that the Plaintiff meant the property to remain in his father's family. *Hall* v. *Hall* (1), *Henry* v. *Armstrong* (2), and *Phillips* v. *Mullings* (3) were cited.

Warmington, in reply.

NORTH, J.:—

I have come to the conclusion, though not without some doubt, that the Plaintiff is entitled to limited relief, namely, to the extent of having a power of appointment added to the deed. The Plaintiff's case is twofold, first, as to the rectification of the deed, and secondly, as to the sale of the reversion. They are totally separate, and I will deal first with the deed of settlement. [His Lordship then said that he was satisfied that the conduct of the Plaintiff was such that it was necessary to do something in order to protect him from himself. His Lordship referred to the evidence as to the visit made by the Plaintiff to his aunt and to his cousin Mr. *Peshall*, and as to what had taken place between the Plaintiff and Mr. *Couchman*.]

Now as far as regards any idea of fraud or undue influence, in my opinion there is no foundation for the Plaintiff's case, and he is not entitled to any relief based on that ground. It does appear that the object of the honest desire on the part of the Plaintiff's relatives was that there should be a settlement made for the purpose of protecting him against himself. In the course of drawing the settlement the question arose as to how the property should go over afterwards, and I have no doubt that, as Mr. *Couchman* says, the Plaintiff's attention was called to the proposition that it should go over to the other members of the father's family, and that the settlement was drawn in that way according to his instructions. The suggestion that he did not know, or did not understand it, seems to me to be entirely unfounded.

But there is an omission from the settlement of a power which, in my opinion, is a usual power, and which ought to have been

(1) Law Rep. 8 Ch. 430. (2) 18 Ch. D. 668.
(3) Law Rep. 7 Ch. 244.

given, namely, a general power of appointment by the Plaintiff when the purposes of the settlement of protecting himself against himself were answered, and antecedent to the limitation in favour of the next of kin. I do not consider the question whether it would be right or wrong to omit such a power if he knew all about it. If the Plaintiff had been told of it, and if his attention had been called to the omission, then the fact that I might think the omission wrong would not affect the view I should take. But it does seem to me that he did not understand that the effect of what was being done might be to deprive his nearest relations of what they would take in case of his death without having executed the settlement and without having left wife or children—it might be that the persons who would take under that limitation to the paternal next of kin might be the grandchildren of the Defendant *Peshall*—but whoever they might be, the property would go on the death of this young man to persons who were merely his cousins, or further removed still, to the possible exclusion of his own mother. That seems to me to be a thing which was not in his consideration, and which ought to have been brought to his attention, and I think that he did not understand that the effect of what he was doing was to deprive himself of a power which might have been given to him after every purpose of protecting himself, his wife, and children had been answered, and that the omission to call his attention to the absence of such a power as that is a thing of which he has a right to complain. The case of *Wollaston* v. *Tribe* (1) seems to me very much in point. In that case I find that the Master of the Rolls made these remarks (2): "In the first place, the settlement is not in the usual form. According to the usual form, Mrs. *Wollaston* would have had reserved to her a power of appointment in case she had no children, and then, in default of appointment, the property would have been given to the nephews and nieces. It is quite clear in this case that she intended the nephews and nieces to take under the ultimate limitation"—as I consider is clear in the present case—"but it is by no means clear that she intended to deprive herself of all choice in the matter. This strikes me as a material circumstance. One of the defendants, Mr. *Henty*, a brother-in-

(1) Law Rep. 9 Eq. 44. (2) Law Rep. 9 Eq. 49.

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law of the plaintiff, was the person who gave the instructions for the settlement. What was written down by the solicitor who took the instructions is very plain; but there is nothing to shew that the ultimate limitation to the nephews and nieces was to be irrevocable. If these instructions had been sent to a draftsman, he would certainly either have introduced a power of revocation, or called attention to the point." Then he refers to the way the draft was drawn; and then he says: "The solicitor's attention is expressly called to this point; he speaks to the lady on it; she says that she wishes the property to go to her nephews and nieces; but she does not say that it is to be given to them so that she cannot alter it. She might very well think, 'I wish it to go to them; let it be given to them; and if I do not change my mind, this will save me the trouble of making a will.' But it does not follow that she did not intend to reserve power to herself to change her mind, and alter the gift. I assume that it was the plaintiff's own proposition to give it to the nephews and nieces, but it does not follow that it was to be an irrevocable gift; and it is quite certain, from the solicitor's evidence, that he never told her that it was irrevocable. He says, 'I do not think that I explained to the plaintiff the position in which she would be placed by the settlement in the event of her surviving the said *Robert Wollaston*,' but that is just what he ought to have explained. She never had fully explained to her the peculiar nature of the settlement which she executed." Now I adopt all that statement with this exception. The Master of the Rolls to some extent relied on the fact of the settlement not being in the usual form. The fact that a usual power was omitted here would not weigh with me in the least if I were satisfied that the omission of such power had been brought to the attention of the settlor, as he would then have been competent to judge for himself. But it seems to me that in the present case his attention was not called to the omission. This is clear from Mr. *Couchman's* evidence. [His Lordship then recapitulated part of Mr. *Couchman's* evidence to the effect that he thought he was bound to look after the property, and to use every lawful means that the property was not wasted, and that was why he did not give a power of dealing with the property in default of wife or children. He did not know that he

called attention to the fact that such a power was being omitted, but he told the young man generally that the funds would go back to his relations in what was the proper way. He thought it undesirable that the property should go to the young man's creditors.]

That fully and entirely explains the line Mr. *Couchman* took. He was in reality consulting the interests of the family principally and in the first place that of the Plaintiff; but as regards the ultimate remainder, what Mr. *Couchman* considered was that it ought not to go out of the family to creditors. If there was a provision of that sort to be made, it seems to me that he ought to have called the attention of the Plaintiff to it. What he did was, I am quite satisfied, as straightforward and honest as could be; but I think there was an omission to call the attention of the Plaintiff to the fact that the settlement did not contain a power to appoint in default of issue, and that the Plaintiff was giving up the power of disposing of his own property after his own death if the interests of wife and children had either never arisen or had come to an end. It seems to me, therefore, that as far as the settlement goes there must be a rectification to that extent, which can be, if necessary, done by indorsement on the settlement. But I am so satisfied that what the trustees did was honest and straightforward and for the best interest of the Plaintiff that I shall do what Vice-Chancellor *James* did in *Everitt* v. *Everitt* (1), I shall give the trustees their costs out of the estate. In that case the settlement was set aside and yet the same thing was done. In this case I am not asked to set aside the settlement, and the trustees are brought here not by reason of any claim they have set up, but as representing absent parties who cannot be ascertained. It was, therefore, the duty of the trustees to come here and maintain the settlement, and they would have acted improperly in my opinion if they had not taken that course. Under those circumstances the expense of defending the action has been incurred by them in the proper discharge of their duty, and therefore there must be a declaration that the costs of the trustees are a charge upon the trust estate. I say nothing about the costs of the Plaintiff.

(1) Law Rep. 10 Eq. 405.

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[His Lordship then expressed his opinion that there was no case for setting aside the sale of the reversion and dismissed that part of the action with costs.]

CUR.:—Declare that the indenture of settlement dated the 11th of December, 1875, ought to be rectified by reading the same as if there was inserted therein prior to the limitation in trust for the person or persons, &c., a power for the Plaintiff by deed or will to appoint the trust funds in such manner and to such persons as the Plaintiff shall think proper, and that the aforesaid limitation in favour of the next of kin should be conditional upon the non-execution of the aforesaid power and subject to any execution thereof. And it is ordered that a copy of this order be indorsed on the said indenture of settlement.

Solicitor for Plaintiff: *E. D. T. Matthews.*
Solicitors for Defendants: *T. White & Sons.*

C. M.

Distinguished. BANQUE DES MARCHANDS DE MOSCOU *v.* KINDERSLEY. [1950] 2 All E.R. 105.

(1885) 29 Ch. D. 219. *In re* LLOYD GENERALE ITALIANO.

Explained. BANQUE DES MARCHANDS DE MOSCOU *v.* KINDERSLEY [1951] 1 Ch. 112

In re LLOYD GENERALE ITALIANO.

PEARSON, J.

1885 *Feb.* 28.

Company — Winding-up — Jurisdiction — Foreign Company — Companies Act, 1862 (25 & 26 *Vict. c.* 89, *s.* 199) [*Revised Ed. Statutes, vol. xiv., p.* 247].

There is no jurisdiction under the *Companies Act*, 1862, to wind up a foreign company which has carried on business in *England* by means of agents, but which has no branch office of its own there.

THIS was a petition for the winding-up of the *Lloyd Generale Italiano*. The petition was presented by the company.

The company was established in 1881 as a *société anonyme* at *Genoa*, and was authorized by a royal decree of the King of *Italy*. It was not registered under the *Companies Act*, 1862, in any part of the *United Kingdom*. It was established for the purpose of carrying on the business of marine insurance. It had carried on business in *Italy*, and also in *England*, the business there being transacted by means of agents. The company had no branch office of its own in *England*. There were a number of creditors in *England*, but the company had no assets there. On the 15th of December, 1884, the company, at a general meeting held in *Italy*, resolved on a winding-up under the provisions of the articles, and appointed liquidators. The petition alleged that the liquidators were desirous of sending money at once to *England* for the payment of a dividend to the English creditors of the company, but that they could not safely do so except to a liquidator duly appointed in *England*; and that the assets of the company to be remitted to *England* would be insufficient to pay the English creditors in full, and, if remitted to an agent of the company not being a liquidator, might be attached in his hands. The petition asked that the company might be wound up under the provisions of the *Companies Acts*, 1862 and 1867.

Farwell, for the Petitioners:—

The Court has jurisdiction under sect. 199 of the *Companies Act*, 1862, to make a winding-up order. A foreign corporation can sue and be sued in this country, and is subject to all the rules of procedure here. The Petitioners in the present case are the

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company. It is immaterial whether a foreign company has a branch office in this country or carries on business here by means of agents: *In re Commercial Bank of India* (1); *In re Matheson Brothers* (2); *Princess of Reuss* v. *Bos* (3); *Newby* v. *Von Oppen* (4); *Story's* Conflict of Laws (5); *Buckley* on the Companies Acts (6). We desire to have a liquidator appointed here for the purpose of making a proper distribution of the assets; we fear that if moneys are sent over here they may be attached by some of the creditors. The terms of sect. 199 are perfectly general, and they have not been restricted to English companies.

Cozens-Hardy, Q.C., and *Stirling*, for English creditors who opposed the petition, were not called on.

PEARSON, J.:—

In my opinion I have no jurisdiction to make a winding-up order, however convenient it might be that such an order should be made. I should be making an order for which there is no precedent and no authority. This company is established at *Genoa*, and it carries on business there. It has agents in *England*, and nothing but agents, and it has carried on business here through those agents, in the same way as foreign merchants often carry on business in this country by means of agents. The jurisdiction to wind up a company is a purely statutory one under the *Companies Acts*. If I were to adopt Mr. *Farwell's* argument, I must come to the conclusion that, in every case in which a foreign company has had any dealings in this country—whether the company is established in *China*, or *Japan*, or *Australia*—there is jurisdiction to order it to be wound up. I am decidedly of opinion that the Act is confined to English companies, and foreign companies carrying on business in *England* with, so to speak, a residence of their own—a branch office—in this country. In the cases which have been cited of orders made to wind up foreign companies, the companies had an office in *England*, but

(1) Law Rep. 6 Eq. 517.
(2) 27 Ch. D. 225.
(3) Law Rep. 5 H. L. 176.
(4) Law Rep. 7 Q. B. 293.
(5) 8th Ed., plac. 556, 557.
(6) 4th Ed., p. 193.

that is not so in the present case. I have no jurisdiction at all, and I must dismiss the petition with costs.

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Cozens-Hardy, Q.C.:—Your Lordship's view is in accordance with that which was expressed by *James*, L.J., in *Bulkeley* v. *Schutz* (1).

Solicitors for company: *Stokes, Saunders, & Stokes.*
Solicitors for creditors: *Waltons, Bubb, & Johnson.*

W. L. C.

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[1883 L. 1926.]

Mortgage—Priority—Negligence—Postponement of Holder of Legal Estate—Trustee of Marriage Settlement—Notice of Marriage of Mortgagor—Duty of Mortgagee to inquire as to Settlement.

In November, 1875, a husband deposited with his bankers the title deeds of some leasehold houses, together with a memorandum of deposit, as a continuing security to the bankers for any overdraft of his wife's current account with them. In November, 1876, he died, having bequeathed all his property to his wife, and appointed her his executrix. After his death the deeds remained with the bankers, and the widow was allowed on the security of them to overdraw her account. In May, 1877, she married again. Prior to the marriage the houses were assigned by her to a trustee on trust for herself for life, and after her death on trust for an infant son of her first marriage absolutely. Power was given to the trustee to sell the houses during the life of the wife, at her request, and after her death at the discretion of the trustee. The trustee made no inquiry about the title deeds, and no notice of the settlement was given to the bankers. In June, 1877, the husband and wife gave notice to the bankers of the marriage, and at their request a balance, which then stood to the credit of the wife's current account, was transferred to a new current account opened by the bankers with the husband. The deeds remained with the bankers, but no notice of the settlement was given to them. In November, 1877, at the request of the bankers, the probate of the first husband's will was sent to them, and at their request a new memorandum of deposit was in January, 1878, signed by the husband and wife, making the deeds a continuing security to the bankers for any overdraft of the husband's current account. In April, 1878, the wife died. The deeds were still with the bankers, and at that time the husband's current account was in credit. In 1883 the trustee

(1) Law Rep. 3 P. C. 764, 769.

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made some inquiries, and then discovered that the deeds, which he had believed to be in the custody of the solicitor who had prepared the settlement, were with the bankers. He then gave the bankers notice of the settlement, and claimed the deeds. This was the first notice that the bankers had had of the settlement:—

Held, that the omission of the trustee to inquire for the title deeds was negligence of such a character as prevented him from availing himself of the legal estate to give him priority over the equitable charge of the bankers, and that the *cestui que trust* stood in no better position.

Held, that the bankers were entitled to priority in respect of the amount due to them on their security at the time when they received notice of the settlement.

When a married woman executes a mortgage there is no obligation on the mortgagee to inquire whether a settlement was made on her marriage.

ON the 17th of November, 1875, *Thomas Adams*, being then entitled to some leasehold houses in *Birmingham*, deposited the leases and other title deeds with *Lloyd's Banking Company*, together with a memorandum signed by him, which stated that the deeds were deposited with the bank, and were to be retained by them, by way of a continuing security to them for any overdraft of his wife's current account. And *Adams* thereby undertook at his own expense, when required by the bank, to execute to them, or as they should direct, a mortgage of all his estate and interest in the premises comprised in the deeds, which mortgage should contain a power of sale and all usual clauses. On the 10th of November, 1876, *Adams* died. By his will, dated the 15th of September, 1876, he gave all his estate and effects whatsoever to his wife absolutely, and appointed her executrix. At the time of his death the deeds thus deposited remained with the bank, and after his death Mrs. *Adams* continued to receive credit from the bank on the security of the deposit. On the 29th of May, 1877, she married *Henry Chance*. On the 25th of May, 1877, in contemplation of the marriage, Mrs. *Adams*, with the assent of *Chance*, assigned the leasehold property comprised in the deposited deeds to *John Jones*, in trust for herself until the intended marriage, and, after the solemnization thereof, upon trust to permit her to use and occupy the premises, or otherwise enjoy the rents thereof for her separate use, until the sale thereof as thereinafter provided, and upon trust that the trustee should, at the sole request in writing of Mrs. *Adams*, notwithstanding coverture, during her

life, and after her death at the discretion of the trustee, sell the leasehold premises, and should stand possessed of the residue of the proceeds of sale (after payment of costs and expenses), and also of the rents and profits of the premises, in case Mrs. *Adams* should not continue to occupy the same, in trust during her life to pay the same to her for her separate use. And it was further declared that, in the event of the death of Mrs. *Adams* before the premises should be sold, the trustee should stand possessed of the same and the rents thereof, in trust for *T. J. Adams* (the son of Mrs. *Adams* by her late husband) absolutely. No inquiry was made by the trustee about the title deeds of the property, and no notice of the settlement was given to the bank. On the 6th of June, 1877, Mrs. *Chance* went with her husband to the bank, and informed the manager of her marriage (this being the first notice the bank had of the marriage), and, at the request of her and her husband, a balance of £133 16*s.* 5*d.*, which then stood to the credit of her current account, was transferred by the bank to the credit of a new account opened in the name of *Henry Chance*. No notice of the settlement was given to the bank, but the deeds were allowed to remain with them as a security for any overdraft of *Chance's* account. In November, 1877, the bank wrote to *Chance*, whose account was then overdrawn, requesting him to let them have a copy of the will of Mrs. *Chance's* former husband, that they might consider what was necessary to be done under the altered circumstances. The probate of the will was sent to them, and they, after consulting their solicitors, requested Mr. and Mrs. *Chance* to sign a new memorandum of deposit of the deeds. This was done on the 26th of January, 1878, the new memorandum stating that the deeds were deposited with the bank as a continuing security to them for moneys advanced by them to *Henry Chance*, whether on current account or otherwise. In April, 1878, Mrs. *Chance* died. The deeds were still with the bank, and at that time *Chance's* account was not overdrawn. He afterwards received credit from the bank on the security of the deposit. After the death of his wife, *Henry Chance* continued to reside in one of the leasehold houses, and received the rents of the others. The son of his wife by her former marriage, who was an infant, lived with him and was maintained by him. In the year 1883 *Jones* was

PEARSON, J. informed of some remark which *Chance* had made in the market place about the property, and this induced him to make inquiry about the deeds of a Mr. *King*, a solicitor, who had prepared the settlement, and in whose custody *Jones* up to this time believed that the title deeds of the property were. Inquiries were made, and it was then for the first time discovered that the deeds were with the bank. In April, 1883, *Jones* gave notice of the settlement to the bank, and claimed the deeds from them. This was the first notice which the bank had of the settlement. The bank insisted that their charge was entitled to priority, and they brought this action against *Jones* and the infant *T. J. Adams*, claiming a declaration that they were entitled to a valid equitable mortgage of the property, and asking for foreclosure or sale. *Chance* had filed a liquidation petition. Before the trial of the action, both he and *King* had died.

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Cozens-Hardy, Q.C., and *W. Phipson Beale*, for the Plaintiffs :—

The Defendant *Jones*, when he became trustee of the settlement, made no inquiry about the title deeds of the property, and on that ground alone he ought to be postponed to the charge of the bank, and the infant *cestui que trust* can stand in no better position than his trustee. An ordinary purchaser who had made no inquiry about the title deeds would have been postponed to the bank; why should persons who claim under a marriage settlement be in a better position? It may be said that the title deeds were left in the proper custody, because Mrs. *Chance* was the first tenant for life under the settlement. But the deeds shewed that she was the absolute owner of the property, and the trustee of the settlement could not be justified in allowing her to have possession of the deeds under such circumstances. A banker is entitled to rely upon a charge to secure the balance of a customer's current account, even if there was nothing due at the time when the charge was created, until he has notice of some other title intervening. The infant has no right except under a contract between the husband and wife: *Gale* v. *Gale* (1); *Mackie* v. *Herbertson* (2); and he cannot be allowed to claim through a fraud.

(1) 6 Ch. D. 144. (2) 9 App. Cas. 303.

[PEARSON, J.:—I must assume that there was an agreement between the husband and the wife that the child of the first marriage should take under the settlement.]

The rule that a person who neglects to inquire about the title deeds of property will be postponed applies to those who claim through a marriage settlement just as it does to any one else: *Maxfield* v. *Burton* (1). The material date is that of the notice of the subsequent title to the person who holds the deeds. The circumstances were such as to put *Jones* upon inquiry, and as he neglected to make inquiry he must, notwithstanding that he has the legal estate, be postponed to the prior equitable charge of the Plaintiffs: *Spencer* v. *Clarke* (2); *Clarke* v. *Palmer* (3); *Northern Counties of England Fire Insurance Co.* v. *Whipp* (4); *Waldron* v. *Sloper* (5). In *Clarke* v. *Palmer* a legal mortgagee was postponed to a subsequent equitable mortgagee because he had allowed the mortgagor to retain the title deeds. The sending of the probate of the first husband's will to the bank was a representation by the husband and wife that their title to the property was derived under the will.

C. H. Turner, and *Gover*, for the Defendants:—

The child of the first marriage was not a volunteer; he was within the marriage consideration, and must be treated as a purchaser for value without notice of the prior charge of the bank: *Newstead* v. *Searles* (6). The authority of that case has never been impugned: *Clarke* v. *Wright* (7).

The bank was guilty of negligence in not, when they received notice of the second marriage, inquiring whether any settlement had been made of the wife's property. It was their duty to make that inquiry. It is the practice of conveyancers to make such an inquiry when the property of a married vendor is being dealt with: *Dart's* Vendors and Purchasers (8); and the practice of the Court is not to part with money belonging to a married woman without evidence that it has not been settled.

(1) Law Rep. 17 Eq. 15.
(2) 9 Ch. D. 137.
(3) 21 Ch. D. 124.
(4) 26 Ch. D. 482.
(5) 1 Drew. 193.
(6) 1 Atk. 265.
(7) 6 H. & N. 849, 867.
(8) 5th Ed. vol. i. p. 329.

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[PEARSON, J.:—In *West* v. *Reid* (1) *Wigram*, V.-C., referring to *Jones* v. *Smith* (2) said (3): "There was nothing in the fact of marriage which raised a legal presumption or inference that it was settled;" and in *Dawson* v. *Prince* (4) it was doubted by *Knight Bruce* and *Turner*, L.JJ., whether the fact that a bill was made payable to the order of a married woman was notice that it related to her separate estate.]

The possession of title deeds does not prove that the possessor is the absolute owner of the property; he may be only tenant for life, for a tenant for life is entitled to the custody of the deeds: *Davidson's* Conveyancing (5); *Williams* on Real Property (6); *Leathes* v. *Leathes* (7); *Taylor* v. *Sparrow* (8).

Clarke v. *Palmer* (9) was the case of a mortgage; the Court exercises a wider discretion in such a case than in that of an absolute conveyance. In *Evans* v. *Bicknell* (10) the trustee had been guilty of gross negligence, and yet the bill against him was dismissed. *Maxfield* v. *Burton* (11) is distinguishable from the present case on three grounds: (1.) There was a debt actually due to the bankers at the date of the execution of the settlement; (2.) The wife's solicitor was informed that the deeds were with the husband's bankers, and he made no inquiry; (3.) The husband was not tenant for life under the settlement, and had therefore no right to retain the deeds. In the present case there was nothing due to the bank at the date of the settlement. The question is not one between two equitable incumbrancers, but it is whether the Court will deprive a purchaser for value of the legal estate when he had no notice of any prior incumbrance. The title of the bank arises under the memorandum of January, 1878, and is, therefore, subsequent to the settlement. The amount of consideration for the settlement is immaterial, provided that there was consideration: *Townend* v. *Toker* (12); and, the property being leasehold, there is necessarily consideration given by the trustee in assuming the liabilities under the lease: *Price* v. *Jenkins* (13).

(1) 2 Hare, 249.
(2) 1 Hare, 43.
(3) 2 Hare, 258.
(4) 2 D. G. & J. 41.
(5) 4th Ed. vol. ii. p. 239.
(6) 14th Ed. p. 496.
(7) 5 Ch. D. 221.
(8) 4 Giff. 703.
(9) 21 Ch. D. 124.
(10) 6 Ves. 174.
(11) Law Rep. 17 Eq. 15.
(12) Ibid. 1 Ch. 446.
(13) 5 Ch. D. 619.

Cozens-Hardy, in reply :—

The ordinary rule that a tenant for life is entitled to the custody of the title deeds does not apply to a case of this kind; it does not apply where the tenant for life is himself the settlor. In such a case the possession of the title deeds enables him to represent himself as the absolute owner of the property: *Lewin* on Trusts (1); *Lady Langdale* v. *Briggs* (2). At any rate, at the time of the wife's death, the husband's account with the bank was in credit. Nothing can justify the trustee in not asking for the deeds then, and, had he done so, he would have got them. There is no authority for saying that the bank were bound to inquire whether a settlement had been made on the second marriage. The deposit was a continuing security to the bank, and there was in effect a continuing statement by the husband and wife to the bank that the property was the wife's. The doctrine that negligence will deprive the owner of a legal estate of his priority applies to a purchaser as well as to a mortgagee: *Northern Counties of England Fire Insurance Company* v. *Whipp* (3). There is no hint in the judgment of the Court of Appeal in that case of any distinction between a purchaser and mortgagee.

[PEARSON, J.:—A mortgage is a purchase *pro tanto*.]

Maxfield v. *Burton* (4) was the case of a purchaser.

PEARSON, J. (after stating the facts, and saying that there was no evidence that Mr. and Mrs. *Chance* had purposely concealed the settlement from the bank, and that it was quite possible that Mrs. *Chance* believed that the property had been settled so that she had full power to dispose of it, but that her husband could not touch it, continued) :—

The question is, whether, under the circumstances, the bank are entitled, although they are only equitable mortgagees, to priority over the legal estate vested in the trustee of the settlement. It is said that the infant Defendant has a better equity than the trustee has. I demur to that proposition entirely. I think I should be introducing a most fatal doctrine if I were to

(1) 7th Ed. p. 581.
(2) 8 D. M. & G. 391, 416.
(3) 26 Ch. D. 482.
(4) Law Rep. 17 Eq. 15.

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say that, when the legal estate in property is vested in a trustee under a marriage settlement, the simple fact that his *cestuis que trustent* are ignorant of what he is doing gives them a prior equity over any person who has dealings with him, and who is equally ignorant of the existence of the settlement and of the rights of the *cestuis que trustent*. The question is, there being two equities, and one of them clothed with the legal estate, which of them is entitled to priority. The Defendants' counsel have argued that the equity of the *cestui qui trust* is prior in time to that of the bank, because they say the equity of the *cestui que trust* arose on the 25th of May, or at all events, on the 29th of May, 1877, whereas the equity of the bank, arising under the second memorandum, did not come into *esse* until the 26th of January, 1878, and if the equities are equal, then *qui prior est tempore potior est jure*. But the first question I have to determine is whether the equities are equal.

Now the equity of the bank depends upon this, that, when the settlement was executed in May, 1877, Mr. *Jones*, the trustee, made no inquiry of any sort or description for the title deeds. It has been argued very strenuously that it was not necessary for him to do so, because the wife, as tenant for life, was entitled to the possession of the title deeds. No doubt, where there is a legal tenant for life, who, as settlor, has cut down his estate in fee simple to a tenancy for life, he is entitled to the possession of the title deeds, but I am not aware of any authority for saying that, where leasehold property has been assigned to a trustee upon distinct trusts, any one of the *cestuis que trustent*, whether tenant for life or otherwise, is entitled to the possession of the deeds as against the trustee, and even if that were so, I should hold that some inquiry ought to be made by the trustee at the time when the settlement is executed, that he may know where the deeds are, which, at some time or other, are to come into his possession.

Now, in the present case if the trustee had made inquiry he would have been told that the deeds were deposited with the bank, and if, knowing that, he had then inquired how they came to be deposited there, and upon what terms they were held by the bank, he would have ascertained that they were deposited with

the bank, and were remaining there, as a security for an account which might be overdrawn, and then it would certainly not have been right for him to allow the deeds to remain a single day with the bank without an intimation that the property had been settled. Therefore, at that time seeing that the account of Mrs. *Chance* was in credit, and the deeds might have been removed, or notice given to the bank of the settlement, and a direction given to them to retain the deeds for safe custody for the benefit of all the persons entitled under the settlement, it must have been wrong to allow the deeds to remain with the bank, deposited as they were as a security for an account which might at any moment be overdrawn.

When, in April, 1878, Mrs. *Chance* died, Mr. *Jones* became trustee for the infant, and then at least there could be no doubt that he was entitled to the deeds, but even then he made no inquiry about them, and allowed them to remain with the bank, although, as it happened, if he had asked for them then, he might have got them, because there was no balance then due to the bank upon *Chance's* current account. For five years after Mrs. *Chance's* death the deeds still remained with the bank, deposited as they had been by persons who, for aught that the bank knew to the contrary, had an absolute title to the property. I think, upon the authorities which have been cited, and which are so well known that it would be pedantry for me to go over them again, the doctrine of this Court has always been, that, where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them, and under these circumstances I must decide that the banking company, although only equitable mortgagees, are entitled to priority over the Defendants for the amount due to them on their security at the time when they received notice of the settlement.

I have purposely abstained from casting any imputation of intentional fraud upon either Mr. or Mrs. *Chance*, because the evidence is not sufficient to justify me in imputing to them any intentional misconduct. I desire to say the same thing in the strongest terms as regards Mr. *Jones*. I am satisfied that he has acted with perfect honesty in this transaction, and, probably, if

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Mr. *King* were here, I should be obliged to say that the negligence was more his than Mr. *Jones's*, because Mr. *King*, as the solicitor employed in the transaction, ought to have seen that all the parties for whom he was acting were made perfectly safe. But, whether he did or did not use all the caution which he ought to have used, I do not suppose that he intended to do anything dishonest. I think, however, that the want of caution is that of Mr. *Jones* and his legal adviser rather than that of the banking company.

It is said that when they knew of Mrs. *Chance's* second marriage they ought to have inquired whether any settlement had been made of her property. I am not aware, any more than *Wigram*, V.C., appears to have been, of any presumption of law that, when a woman marries, she will settle her leasehold property. But, though they were not bound to do so, it would no doubt have been more prudent to have made the inquiry. If they had done so, and had been told that there was no settlement, then, on the authority of *Jones* v. *Smith* (1), the banking company would have been perfectly justified in accepting the security.

Solicitors for Plaintiffs: *Sharpe, Parkers, & Co.*, agents for *Ryland, Martineau, & Co., Birmingham.*

Solicitors for Defendants: *Turner, Son, & Norton.*

(1) 1 Hare, 43.

W. L. C.

LEIGH *v.* BURNETT.

PEARSON, J.

1885

March 3.

[1882 L. 1611.]

Mortgage—Renewable Leasehold—Purchase of Reversion by Mortgagor—Mortgage of Reversion—Rights of Mortgagees—14 & 15 *Vict. c.* 104, *s.* 3 [*Revised Ed. Statutes, vol. xi., p.* 275]—23 & 24 *Vict. c.* 124, *s.* 35 [*Revised Ed. Statutes, vol. xiii., p.* 850].

An ecclesiastical lease of a house for a term of years, which was renewable by custom, though it contained no covenant by the lessors for renewal, was mortgaged, and the equity of redemption was afterwards assigned for value. The Ecclesiastical Commissioners, in whom the reversion had become vested, would not renew the lease, but before its expiration they agreed to sell the reversion to the assignee of the equity of redemption. The conveyance was not executed till after the expiration of the lease. While the negotiation for the purchase of the reversion was in progress the assignee borrowed £300, giving the lender a memorandum in writing, which stated that the money was to be secured by a mortgage from him of the house "so soon as he had completed the enfranchisement of the property from the Commissioners." The lender had no notice of the mortgage of the lease:—

Held, that the mortgagor could only hold the fee simple of the property subject to the mortgage of the lease, and that he (and consequently the lender of the £300) was not entitled to any prior lien on the property for the purchase-money of the reversion, notwithstanding the fact that the mortgagor was under no obligation to the mortgagees of the lease to obtain a renewal of it, or to purchase the reversion.

On the 10th of November, 1863, the equity of redemption of a leasehold house in *South Street, Chichester*, was assigned to *W. H. Newman*. The lease was then subject to a mortgage, which afterwards became vested in *R. Ingram* and *C. E. Dawkins*, two of the Defendants to this action. The lease had been granted on the 2nd of May, 1853, by the Dean and Chapter of *Chichester*, in consideration of the surrender of a former lease and of the payment of a fine, to *William Skelton*, for the term of thirty years from the 29th of September, 1851. It had been the custom of the Dean and Chapter to renew the leases of their property, but the lease contained no covenant for renewal. The reversion in fee became afterwards vested in the Ecclesiastical Commissioners, who would not renew the lease. In the year 1880 *Newman* was negotiating

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with the Commissioners for the purchase of the reversion in fee, and on the 20th of October, 1880, he borrowed £300 from the Plaintiff *Jessie Emma Leigh*, the wife of the Plaintiff *Thomas Leigh*, giving her a memorandum in writing which stated that the £300 was to be secured by a mortgage from him to her of the house in *South Street*, so soon as he had completed "the enfranchisement of the said property from the Ecclesiastical Commissioners," and that, meanwhile, he had deposited in her hands his title deeds of some property at *Lyndhurst*. Mrs. *Leigh*, when she advanced the £300, had no notice of the mortgage of the leasehold interest to the Defendants *Ingram* and *Dawkins*. *Newman* afterwards concluded an agreement with the Commissioners for the purchase of the reversion, but the conveyance to him was not executed until December, 1881.

On the 25th of January, 1882, *Newman* was adjudicated a bankrupt. The Plaintiffs claimed a declaration that they were entitled to an equitable charge for the £300 on the house in *South Street*, and that the mortgage might be enforced by foreclosure or sale. The Defendant *Burnett* was the trustee in bankruptcy of *Newman*.

Cozens-Hardy, Q.C., and *G. Curtis Price*, for the Plaintiffs:—

Newman never was lessee of the property. The Commissioners did not purport to sell to him under the provisions of the Act 14 & 15 Vict. c. 104, s. 3. They had power to sell to any one who was not a lessee. The conveyance of the fee was not executed till after the lease had expired.

Cookson, Q.C., and *Townsend*, for the Defendants *Ingram* and *Dawkins*:—

The Commissioners negotiated for the sale of the reversion to *Newman* as being the owner of the lease, and the agreement for sale was made while the lease was still in existence, though the conveyance was not executed till afterwards. *Newman* could not acquire the fee except for the benefit of the mortgagees of the lease: *Coote's* Law of Mortgages (1); *Postlethwaite* v. *Lewthwaite* (2); *Keech* v. *Sandford* (3); *In re Lord Ranelagh's Will* (4).

(1) 5th Ed. vol. i. p. 268.
(2) 2 J. & H. 237.
(3) 2 Eq. C. Ab. 741.
(4) 26 Ch. D. 590.

J. Chester, for *Newman's* trustee in bankruptcy.

Cozens-Hardy, in reply:—

Newman was at any rate entitled, in priority to the mortgagees of the lease, to a lien on the reversion for the sum which he paid to the Commissioners for it, and the Plaintiffs are entitled through him to the benefit of that lien. He was under no obligation to obtain a renewal of the lease, or to purchase the reversion: *In re Lord Ranelagh's Will* (1). It cannot be supposed that he intended to make a present of the reversion to the mortgagees of the lease. Their security would have been of no value if the lease had simply expired; why should they have the benefit of the purchase of the reversion without paying the purchase-money? Sect. 3 of the Act 14 & 15 Vict. c. 104, puts trusts and incumbrances on the same footing.

Sect. 35 of the Act 23 & 24 Vict. c. 124, enables trustees of an ecclesiastical lease, or any person being under any will or other settlement in the actual possession or receipt of the rents of the land comprised in the lease, upon purchasing the reversion to charge the lands with the payment to any person advancing the money paid for such purchase of the money so advanced. And, independently of any statutory provision, any person who purchases a reversion under such circumstances is entitled to a prior lien on the property for the purchase-money: *Postlethwaite* v. *Lewthwaite* (2); *In re Lord Ranelagh's Will.*

[PEARSON, J.:—If a mortgagor spends money in improving the mortgaged property, he is not entitled to any lien as against the mortgagee.]

That is not an analogous case, and in the present case there is not an improvement of the mortgaged property, but the creation of a new property.

[PEARSON, J.:—The reversion took the place of a renewed lease: *Rakestraw* v. *Brewer* (3).]

That was the case of a custom or right of renewal; *Newman* was under no obligation to obtain a renewal; he was only assignee

(1) 26 Ch. D. 590.
(2) 2 J. & H. 237.
(3) 2 P. Wms. 511.

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of the equity of redemption of the lease. Under sect. 35 of the Act 23 & 24 Vict. c. 124, he could have created an overriding charge for the purchase-money of the reversion.

[PEARSON, J. :—He might have done so, but he did not.]

Cookson, Q.C. :—The Act does not interfere with any equities between mortgagor and mortgagee.

PEARSON, J. :—

Newman entered into the negotiation with the Ecclesiastical Commissioners as being the *de facto* lessee of the property, and, while the negotiation was in progress, he borrowed £300 from the Plaintiff, and gave her a charge for it on the property, which was to be conveyed to her so soon as the negotiation with the Commissioners should be completed. In December, 1881, it was completed, and the property was conveyed to him in fee simple by the Commissioners, and he paid the purchase-money for it. The question is, what is the position of the Plaintiff under her memorandum of charge as regards the prior mortgagees of the lease? Is the Plaintiff entitled, not to priority over those mortgagees, but to the benefit of a charge in respect of the amount which *Newman* paid for the purchase of the reversion. It has been argued that, as *Newman* was not the original mortgagor of the lease, and was under no obligation to renew the lease or to purchase the reversion, he was entitled as against the mortgagees of the lease to a lien on the property for the purchase-money, and that what he mortgaged to the Plaintiff was any interest which he might have in the property when he should have completed the purchase of it, and that, consequently, that lien passed to the Plaintiff, and the mortgagees of the lease are not entitled to the benefit of the purchase without satisfying the lien. To my mind there is a grievous fallacy in this argument. I can only treat *Newman* as the mortgagor of the lease, and in that character he could hold the reversion only on the same terms as he would have held a renewed lease of the property. The doctrine of this Court has always been that the mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage. The

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case of *Rakestraw* v. *Brewer* (1) is an illustration of this doctrine. There the mortgagee of a renewable term procured from the original landlord a new term to commence from the expiration of the old one, and it was held that the new term was subject to the old equity of redemption. If *Newman* himself were here he would be entitled to redeem the reversion on paying off the mortgages, but he would not be entitled to say to the mortgagees of the lease, I bought the property for your benefit, and you can only have it on paying me the purchase-money which I gave for it. I cannot understand how any one who claims through *Newman* can be in any better position than he would have been. It is impossible for the Plaintiff to say that, in respect of the purchase-money paid by *Newman*, she is entitled to priority over the mortgagees of the lease. I can conceive that she might be able to establish such a claim if she had advanced the money to buy the reversion, but that would be because she had no interest in the property through *Newman*, but was giving up a purchase on the terms of being repaid what she had given for it. As it is, she has only a derivative title through *Newman*, and he could not have maintained such a claim against the mortgagees of the lease.

Solicitor for Plaintiff: *J. J. Harlow.*

Solicitors for Defendants: *Watson, Sons, & Room*, agents for *W. A. Way, Portsea; Robins, Cameron, & Kemm.*

(1) 2 P. Wms. 511.

W. L. C.

PEARSON, J.
1885
March 14, 21.

In re WEAVER.
HIGGS *v.* WEAVER.

[1884 W. 3340.]

Administration of Insolvent Estate—Transfer to Court of Bankruptcy—Discretion of Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125.

The power given by sect. 125 of the *Bankruptcy Act*, 1883, to transfer the proceedings in an action brought for the administration of an insolvent estate to the Court of Bankruptcy, is a discretionary one, and it will not be exercised where the estate is small, the number of creditors is small, and considerable expense has been already incurred in Chambers in the proceedings under an administration judgment.

Semble, that an application for transfer can only be made by a creditor who has absolutely proved his debt.

SUMMONS by persons describing themselves as creditors of *James Weaver* deceased, asking that the proceedings in this action, which was brought by a creditor for the administration of the estate of *James Weaver*, might be transferred to the *London* Bankruptcy Court, on the ground that *Weaver's* estate was insufficient to pay his debts.

Weaver died in 1884, having by his will appointed his wife his executrix. His estate was insufficient to pay his debts, the value of his assets being about £500, and his debts amounting to about £1000. In September, 1884, a meeting of his creditors was held at the instance of the executrix, when the creditors were informed of the condition of his affairs. At a subsequent meeting a composition of 7*s.* 6*d.* in the pound was offered to the creditors on behalf of the executrix. Many of the creditors who were present expressed their willingness to accept the offer, but *John Hutton*, who claimed to be a creditor for £66 8*s.* 11*d.*, refused to do so, and on the 24th of September he presented to the *London* Bankruptcy Court a petition, under sect. 125 of the *Bankruptcy Act*, 1883, praying for an order for the administration of the estate of *Weaver* according to the law of bankruptcy. On the same day, but at a later hour, *Richard Higgs* issued the writ in this action against the executrix. On the 1st of October an administration order was made, and *John Bath* was appointed receiver of the testator's assets and manager of his business, and he took possession in pursuance of the order.

On the 30th of September, 1884, the bankruptcy petition came on to be heard by Mr. Registrar *Brougham*, and he adjourned the hearing to enable an application to be made for the transfer of the proceedings in the action to the Court of Bankruptcy.

On the 14th of November, 1884, this summons was taken out by *Hutton*, and three other persons who respectively claimed to be creditors of the testator. The applicants had not yet proved their debts, and their claims were disputed.

Charles Browne, for the applicants:—

Sect. 125 (1) of the *Bankruptcy Act*, 1883, shews that it was the intention of the Legislature that the estates of persons who have died insolvent should be administered in the Court of Bankruptcy, unless some cause is shewn to the contrary. The presumption is in favour of the transfer.

Oswald, for the Plaintiff:—

If an order of transfer is made all the expense already incurred in Chambers under the administration judgment will be thrown away; everything will have to be commenced *de novo*. It is intended by sub-sect. 4 that the transfer should be made before an administration order has been made: *Ex parte May* (2).

(1) Sect. 125 provides: "(1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy.

"(2.) Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the Court may, in the prescribed manner, upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may upon cause shewn dismiss such petition with or without costs.

"(4.) A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate, but that Court may in such case, on the application of any creditor, and on proof that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon such last-mentioned Court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor."

(2) 13 Q. B. D. 552.

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At any rate, the power to order a transfer is discretionary. Only four creditors out of a total number of twelve or fourteen make the application; the others agree with the Plaintiff in opposing it.

Gayer, for the Defendant, also opposed the application.

Charles Browne, in reply:—

[PEARSON, J.:—Why have the applicants not proved their debts in Chambers?]

They have not been called on to do so.

March 21. PEARSON, J.:—

My Chief Clerk informs me that considerable expense has been already incurred in Chambers, and this will be all thrown away if I send this wretched estate to be administered in the Court of Bankruptcy. In the exercise, therefore, of the discretion given to me by sect. 125 I think it would be unwise now to make the transfer, which I should gladly have made if the application had come before me at an earlier period. Considering the small value of the assets and the small number of creditors, I think it is better that the administration should now go on in this Court. Moreover, the alleged debts of the applicants have not been admitted or proved; they are in dispute, and, as at present advised, I am inclined to think that I ought not to make such an order unless the debt of the applicant has been absolutely proved, so that no proceedings to prove it would have to be taken in the Bankruptcy Court. This seems to have been the view of the Divisional Court in *Ex parte May* (1). I do not, however, rest my decision on this ground. The applicants must pay the costs, for I am confirming the view which was taken by my Chief Clerk.

Charles Browne:—If this summons had been heard immediately after it was issued most of the expenses in Chambers would not have been incurred.

Solicitor for applicants: *G. W. Churchley.*
Solicitors for Plaintiff: *Keene, Marsland, & Bryden.*
Solicitors for Defendant: *Simpson, Palmer, & Winder.*

(1) 13 Q. B. D. 552. W. L. C.

SOCIÉTÉ GÉNÉRALE DE PARIS *v.* DREYFUS BROTHERS.

PEARSON, J.

1885

March 20, 21, 26.

[1885 S. 385.]

Practice—Rules of Supreme Court, 1883, *Order* XI., *r.* 1 *sub-s.* (*f*)—*Service out of the Jurisdiction.*

The Court will exercise discretion in allowing or disallowing service out of the jurisdiction, and in so doing will consider evidence as to the merits.

THIS was a motion to discharge an order giving leave to the Plaintiffs to serve the Defendants, Messrs. *Dreyfus Brothers*, with the writ out of the jurisdiction under Order XI. r. 1, sub-sect. (*f*).

The Plaintiffs were a French company domiciled in *Paris*. The Defendants were M. *Dreyfus*, a domiciled Frenchman resident in *Paris*, sued as *Dreyfus Brothers*, the *Peruvian Guano Company, Limited* (an English company), and *B. Premsel*, a domiciled Frenchman resident in *Paris*, the present owner of the business of *Leiden, Premsel, & Co.*, a French firm.

The writ in the present action was indorsed with a claim for (1) a declaration that the money in Court to the credit of an action of *Dreyfus* v. *Peruvian Guano Company* belonged to the Plaintiffs and the other parties interested under a contract of the 6th of July, 1869, made between the defendants *Dreyfus Brothers & Co.*, of the first part, *Leiden, Premsel, & Co.*, of the second part, and the Plaintiffs of the third part; (2) a receiver; (3) an injunction restraining *Dreyfus Brothers* from receiving or dealing with the funds in Court.

Messrs. *Dreyfus Brothers & Co.* entered into a *traité* with the Peruvian Government dated the 5th of July, 1869, to find money in consideration of consignments of guano.

Messrs. *Dreyfus Brothers*, Messrs. *Leiden, Premsel, & Co.*, and the Plaintiff *société* entered into a tripartite *contrat* dated the 6th of July, 1869, and executed at *Paris*. The *contrat* recited that, the *traité* of the 5th of July, 1869, having been signed, it had been agreed that the execution of that *traité* should be carried out

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en participation between the Plaintiffs, Messrs. *Leiden, Premsel, & Co.*, and Messrs. *Dreyfus Brothers*, subject to *conditions*. By the first of these the *Société Générale* and Messrs. *Leiden, Premsel, & Co.*, bound themselves to place at the disposal of Messrs. *Dreyfus Brothers* the funds necessary for carrying out the *traité* by at once handing them letters of credit; and on their side Messrs. *Dreyfus Brothers* bound themselves to execute the *traité* for the account of the *participation*. *Condition* 2 fixed the limit of advance by the *Société Générale* and Messrs. *Leiden, Premsel, & Co.* at sixty million francs, of which Messrs. *Dreyfus Brothers* had the option of advancing fifteen millions, and taking a proportionate profit (Messrs. *Dreyfus Brothers* did exercise the option). *Condition* 4 provided that, if necessary, Messrs. *Dreyfus Brothers* would transfer to the *Société Générale* and Messrs. *Leiden, Premsel & Co.* the securities they held under the *traité*. *Condition* 5 provided that Messrs. *Dreyfus Brothers* should keep both at *Lima* and in *Europe la gérance administrative* of all that related to the commercial branch of the guano *traité*, and on the other hand they engaged to leave *la manipulation financière* in *Europe* in the hands of the *Société Générale* and Messrs. *Leiden, Premsel, & Co.* It was therefore agreed that as the contracting parties placed at the disposal of Messrs. *Dreyfus Brothers* the funds necessary for the execution of the *traité* in the same way Messrs. *Dreyfus Brothers* bound themselves to pay immediately after the receipt of the same into the hands of the *Société Générale* and Messrs. *Leiden, Premsel, & Co.*, in proportion to their *participation* all sums which by means of sales or in any other manner should come to them by virtue of the *traité Péruvien*.

By *Condition* 6 Messrs. *Dreyfus Brothers* engaged to execute the *traité d'accord avec les participants à Paris et à leur abandonner* 40 per cent. of all benefits from the *traité Péruvien*.

The bills of lading of a number of cargoes of guano, sent to *Europe* in vessels which had been chartered by the *Peruvian Guano Company*, were transmitted to Messrs. *Dreyfus* by the Peruvian Government. Disputes arose between the *Peruvian Guano Company* and Messrs. *Dreyfus* as to the ownership of such guano. Messrs. *Dreyfus* claimed the guano under their contract of the 5th of July, 1869. The *Peruvian Guano Company* claimed

a paramount right under an earlier contract. Litigation took place in consequence both in this country and abroad. The proceeds of such of the disputed cargoes as were sent to *England*, amounting to nearly £200,000, were paid into Court to the credit of an action of *Dreyfus* v. *Peruvian Guano Company* on the 13th of January, 1885. Vice-Chancellor *Bacon* gave judgment in that action in favour of *Dreyfus Brothers*, and ordered the money in Court to be paid to them. The money so ordered to be paid to *Dreyfus Brothers* is the subject of this action.

Proceedings had been instituted in the *Tribunal de Commerce* at *Paris* by *Dreyfus Brothers* against the Plaintiffs and *B. Premsel* to determine the rights of the parties under the contract of the 6th of July, 1869. In those proceedings judgment was pronounced in November, 1884. The Court then made certain declarations as to the rights of the parties, and directed certain accounts to be taken. On the part of Messrs. *Dreyfus* it was contended that the Plaintiffs and *B. Premsel* under the contract of *participation* of the 6th of July, 1869, had according to French Law no right to any part of the proceeds of the guano, but merely a personal right to an account and to stand as creditors of *Dreyfus Brothers* in respect of what (if anything) should be found due on taking such accounts. In support of that contention the judgment of the *Tribunal de Commerce* and the opinions of certain *avocats* were relied on. On the other hand, it was contended on the part of the *Société Générale* that they and *B. Premsel* had a right against the money in Court, and in support of their contention the judgment of the *Tribunal de Commerce* and the opinions of other *avocats* were relied on.

Davey, Q.C., and *Ingle Joyce*, for the motion :—

The Court has a discretion, which will be exercised with jealousy, in allowing or refusing to allow service out of the jurisdiction; the fact that both parties are foreigners is a reason for not assuming jurisdiction if it can be avoided. If it can be shewn either that the Plaintiffs have no right *in rem* within the jurisdiction, or that they can get relief as speedily and well in their own country (both of which facts are established by the evidence), the order allowing service out of the jurisdiction will be

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discharged: *Great Australian Gold Mining Company* v. *Martin* (1); *Agnew* v. *Usher* (2); *Hawarden* v. *Dunlop* (3); *Maclean* v. *Dawson* (4); *Fowler* v. *Barstow* (5); *Diamond* v. *Sutton* (6).

Rigby, Q.C., *Cozens-Hardy*, Q.C., and *Northmore Lawrence*, for the Plaintiffs:—

If the case comes within the provisions of the rule allowing service out of the jurisdiction, unless on the face of the writ there is no proper cause of action, the Court will not exercise any discretion in refusing to allow service out of the jurisdiction, or at this stage go into the merits of the action: *Maclean* v. *Dawson*; *Hawarden* v. *Dunlop*; *Foley* v. *Maillardet* (7); *Great Australian Gold Mining Company* v. *Martin*; *Fowler* v. *Barstow*.

Cookson, Q.C., and *H. B. Buckley*, for the *Peruvian Guano Company*.

Butcher, for the Defendant *Premsel*.

Davey, in reply.

PEARSON, J.:—

The case comes under Order XI. r. 1, sub-sect. (*f*), which relates to actions where "any injunction is sought as to anything to be done within the jurisdiction." Speaking without reference to the particular case before me, I do not doubt that the payment of money out of this Court is a matter to be done within the jurisdiction. I do not doubt that where there is a fit and proper case for an injunction to restrain any party from receiving money out of this Court which has been ordered to be paid to him, there is a case in which, all other circumstances being fitting, this Court ought to assume jurisdiction, and ought to assist a foreigner, if he be a foreigner, and prevent him from suffering from the money being paid to a person who, strictly speaking, is not entitled to it. But of course it becomes a very serious question, and ought

(1) 5 Ch. D. 1.
(2) 14 Q. B. D. 78.
(3) 2 Dr. & Sm. 155.
(4) 4 De G. & J. 150.
(5) 20 Ch. D. 240.
(6) Law Rep. 1 Ex. 130.
(7) 1 D. J. & S. 389.

always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.

The course of legislation seems to me to indicate that the Legislature has been of that opinion also. In one of the cases to which I was referred, *Maclean* v. *Dawson* (1), which was heard before Lords Justices *Knight Bruce* and *Turner* in the year 1859, the old rule is given under the Orders of 1845 (Order XXXIII.), "Where a defendant in any suit is out of the jurisdiction of the Court, the Court, upon application, supported by such evidence as shall satisfy the Court in what place or country such defendant is or may probably be found, may order that the subpœna to appear to, or to appear to and answer, the bill, may be served on such defendant, in such place or country, or within such limits as the Court thinks fit to direct." That was as wide an order as could possibly be framed, giving the Court absolute power in any case whatever to order service of the writ out of the jurisdiction. In 1875 that power was contracted, and in 1883, when the present Orders with which I am now dealing were made, it was still further contracted. [His Lordship read Order XI. rule 1, and proceeded:—] It is urged on one side that whenever a case occurs that comes within any one of the sub-sections of the rule the Court really has no discretion, but is bound to order the writ to be served. It is urged on the other side, and as I think correctly, that the Court has discretion whether or not a writ shall be served even in those cases; and, as in the old cases, the Court looked through the bill in order to see whether or not the statements in the bill shewed a reasonable case for granting the writ, so I conceive on the present occasion, when I am dealing simply with the granting of an injunction, I am bound to look into the circumstances of the case to see whether or not there is any sufficient justification to authorize

(1) 4 De G. & J. 150.

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the Court in its discretion to allow service out of the jurisdiction. I am perfectly aware that when I lay down the rule in that way I am laying it down most indistinctly and most indefinitely, but I cannot help doing so. It is said, and said I have no doubt with perfect accuracy, that in these cases you cannot go into the merits of the case, that all you have to do is to ascertain properly whether or not the jurisdiction for the trial of the action is here or elsewhere. But I do not see how in a great number of cases you can go into that question without ascertaining, to some degree at all events, what appear to be the merits of the case. I have tried in vain during the course of the argument to define if I can the boundary between the two matters, and I cannot do so. And although I mean to give no opinion whatever on the merits of the case here, I do intend, to a certain extent at all events, to ascertain, as far as I can, whether there are any merits on the Plaintiffs' side which would justify me in allowing this service to stand.

The French contract of July, 1869, made between the parties was of this nature; I purposely state it generally, because it is not my province to decide upon its absolute construction. In the first place, the *Société Générale* and *Leiden, Premsel & Co.* agreed to advance each thirty millions of francs, making in the whole sixty millions; each of them advancing one half, but subject to this, that they gave Messrs. *Dreyfus* the option if they pleased of advancing fifteen millions themselves out of the sixty millions, and in case they did so one half of the fifteen millions so advanced by Messrs. *Dreyfus* was to be taken as coming out of the amount to be advanced by the *société*, and the other half out of the amount to be advanced by M. *Premsel*. In the event Messrs. *Dreyfus* did advance the fifteen millions, and then the contract provided this—that Messrs. *Dreyfus* were to execute the contract with the Peruvian Government, were to keep the management of the contract entirely in their own hands, and doing so, 40 per cent. of the profits were to be "abandoned," so to speak, to use the French term, by Messrs. *Dreyfus* to the *participation*, and the remaining 60 per cent. were to belong to them.

The real discussion, the real dispute, between the parties as regards this particular point now in controversy arises on a parti-

cular article of the contract, viz., the fifth. [His Lordship stated the effect of *condition* 5, and proceeded:—] There being a sum that has come to Messrs. *Dreyfus* by virtue of the Peruvian contract, the question is whether or not Messrs. *Dreyfus* are entitled to receive that money to begin with, and then to retain it in their own hands until the accounts have been taken between the parties and a conclusion has been arrived at as to whether or not anything at all is owing to the *Société Générale* and to *Leiden, Premsel & Co.*, or whether the *Société* and *Leiden, Premsel & Co.* are not debtors to Messrs. *Dreyfus*, and I have to decide whether, under those circumstances, that being the dispute, I ought to allow this service out of the jurisdiction, in order that the question may be argued before me whether an injunction ought or ought not to be granted restraining Messrs. *Dreyfus* from receiving the money until the matter in controversy is decided.

After a great deal of doubt and difficulty upon the terms of this contract, after considering as well as I could all the arguments addressed to me in the clearest manner by Mr. *Davey* as to the construction put upon this contract by the Tribunal of Commerce in *Paris*, I am not satisfied but that there is a very serious matter of fair dispute between the parties. I purposely abstain from saying more than that on the present occasion, because if I am to have an argument by-and-by on further materials on the question of an injunction, I think I ought, as far as I can, to keep my mind unprejudiced and in suspense as to what is the proper construction of this contract. I desire, therefore, only to say on the present occasion that I think that there is a very serious question to be tried between the parties.

It is argued that this question has been decided by the Tribunal of Commerce. At present I am not satisfied that it has been so decided. I thought at one time that the Tribunal of Commerce had decided all matters between the parties, but upon looking more carefully into the decision of the Tribunal of Commerce, I do not think that this question really was decided by it. I think this is a question which is perfectly open at the present moment between the parties, and, subject to what I may hear upon any further occasion, I think it is a very grave question, and that

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this Court cannot flinch from deciding the question as well as it can, with the assistance of course of such information as may be given upon the proper construction in *France* of such a contract as this.

I therefore come to the conclusion that this is a case in which the Plaintiff properly seeks the assistance of this Court, and that the case he makes has at all events so much of substance apparent on the face of it that this Court cannot say that it is either frivolous or vexatious. I think also that the parties are right, and are entitled, if their case be a good one, to ask for that assistance which they seek in this action, and to prevent this large sum from getting into the hands of Messrs. *Dreyfus & Co.* I must, therefore, refuse to discharge the service of this order, but I think it right to reserve the costs of this application until the motion for an injunction, which I am told is pending in this Court, shall be heard. If upon hearing the motion for an injunction I should come to the conclusion that there is no ground for it, but that my present view that there is at all events something to be said upon it, and something seriously to be said, is a mistaken one, I think that that may influence me in disposing of the costs of this application.

Solicitors: *G. M. Clements; Michael Abrahams, Son, & Co.; C. & S. Harrison & Co.; J. Arscott Bartrum.*

D. P.

In re SHAFTO'S TRUSTS.

PEARSON, J.

1885

March 28.

Power of appointing new Trustees—Executor of sole Trustee—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 31.

The power of appointing new trustees given by sect. 31 of the *Conveyancing Act*, 1881, to "the personal representatives of the last surviving or continuing trustee" includes the case of an executor of a sole trustee.

PETITION for the appointment of new trustees of the will of *W. H. Shafto*, who died on the 11th of February, 1876. The will did not contain any power for the appointment of new trustees, or nominate any person for that purpose. By the will the testator appointed *W. Snowball* the sole trustee thereof. He died on the 28th of March, 1883, having by his will given all estates vested in him on trust to *E. J. Browell*, and appointed him executor.

The petition was presented by some of the beneficiaries. The petitioners submitted that it was doubtful whether the executor of *Snowball* had power to appoint new trustees of *Shafto's* will, and they therefore desired that new trustees should be appointed by the Court.

Nalder, for the Petitioners:—

The petition is presented because it is doubtful whether under sect. 31 of the *Conveyancing Act*, 1881, an executor of a deceased sole trustee has power to appoint new trustees. The power of appointment is given by sect. 31 to "the personal representatives of the last surviving or continuing trustee." A deceased sole trustee can hardly be said to have been the "last surviving or continuing trustee."

PEARSON, J.:—

If I were to hold that sect. 31 does not apply I think I should be placing unnecessary difficulties in the way of a very useful provision. In my opinion sect. 31 applies, but, as the parties desire it, I will make the appointment.

Solicitors: *Collyer-Bristow & Co.*

W. L. C.

PEARSON, J.

1885
March 28.

In re GRIFFITHS (AN INFANT).

Infant—Surrender of Lease—11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 65, *ss.* 12, 14 [*Revised Ed. Statutes, vol. vi., p.* 819.]

The provisions of the Act 11 Geo. 4 & 1 Will. 4, c. 65, for the surrender of a lease to which an infant is entitled, apply to a lease to which an infant is only beneficially entitled, the legal estate being vested in a trustee for him.

PETITION under the Act 11 Geo. 4 & 1 Will. 4, c. 65, for the confirmation by the Court of a conditional agreement for the surrender of a lease to which an infant was beneficially entitled.

James Anderson, by his will dated the 23rd of September, 1881, appointed *J. R. Griffiths* the sole executor and trustee thereof. And the testator devised and bequeathed all his real and personal estate to *J. R. Griffiths*, upon trust during the minority of *Rebecca Griffiths* to pay and apply the income and profits thereof for her support, maintenance, and education, and, subject thereto, to hold all the said real and personal estate for the said *Rebecca Griffiths*. And the testator directed that *J. R. Griffiths* should be at liberty to continue the estate in the same state of investment as it should be in at the testator's death, and particularly it was his wish that *J. R. Griffiths* should carry on the business of a licensed victualler, then carried on by the testator at the *Park Tavern*. The testator died on the 27th of April, 1884. He occupied the *Park Tavern* under a lease for a term of thirty-one years from the 25th of March, 1881. On the 23rd of February, 1885, *J. R. Griffiths* entered into an agreement with the lessors for the surrender of the term to them on or before the 24th of June, 1885, and that they, upon the payment to them of £250, should immediately thereupon grant to him, his executors, administrators, or assigns, a new lease of the premises for the term of forty years from the 24th of June, 1885, upon the terms and conditions therein mentioned. The agreement was made subject to the approval of the Court.

The petition was presented by *Rebecca Griffiths*, who was still an infant, by *J. R. Griffiths* (who was her father), as her next

friend, and by *J. R. Griffiths*, and it asked that the agreement might be confirmed by the Court; that, pursuant to the 12th section of the Act, *J. R. Griffiths* might be appointed guardian of the infant in her place by deed to surrender the lease to the lessors, and to accept in the place and for the benefit of the infant a new lease of the premises on the terms agreed upon; that, pursuant to the 14th section of the Act, the sum of £250 to be paid by *J. R. Griffiths* as a premium for the renewal of the lease, and all reasonable charges incident thereto, including the taxed costs of the application and consequent thereon, might be declared a charge on the premises comprised in the new lease, and might be raised by a mortgage thereof; and that the surrender, new lease, and mortgage might be settled by the Judge.

Begg, for the Petitioners:—

The question is whether the Act applies to a lease in which an infant has only a beneficial interest; whether it is not confined to cases in which the legal estate in a lease is vested in an infant. The words of sect. 12 are "in all cases where any person being under the age of twenty-one years is, or shall become, entitled to" any lease.

PEARSON, J.:—

I think the Act applies. I will make the order asked for, appointing the father guardian of the infant, and directing him to surrender the old lease and accept a new one according to the terms agreed upon. The order must be prefaced with an expression of the opinion of the Court that it is fit and proper and for the benefit of the infant that the agreement should be carried out.

Solicitors: *Clapham & Fitch.*

W. L. C.

PEARSON, J.
1885
March 30.

In re BLOCKLEY.
BLOCKLEY *v.* BLOCKLEY.

[1883 B. 890.]

Father and Child—"Advancement by portion"—Death of Father intestate—Statute of Distributions (22 & 23 *Car.* 2, *c.* 10), *s.* 5 [*Revised Ed. Statutes, vol i., p.* 768].

A gift by a father to a son to enable the son to pay a debt :—

Held, on the death of the father intestate, to be an "advancement by portion" of the son, within sect. 5 of the *Statute of Distributions*.

The opinion expressed by *Jessel*, M.R., in *Taylor* v. *Taylor* (1) dissented from.

FURTHER CONSIDERATION.

This action was brought for the administration of the estate of *John Blockley*, who died in December, 1882, intestate.

On the 16th of July, 1877, the intestate handed to *Thomas Blockley*, one of his sons, a cheque for £1200, payable to the son's order, to enable him to pay a debt of that amount which he then owed. The cheque was afterwards indorsed by the son, and he received the cash for it. The advance was made by the father by way of loan, but the son did not pay any interest for it, and was not asked by his father to do so. After the cheque had been paid by the father's bankers, it was returned by them to him in the ordinary course of business. In October, 1882, the father delivered the returned cheque to the son, telling him at the same time that he made no further claim in respect of it.

The question was whether the £1200 was an "advancement by portion" of the son within the meaning of sect. 5 of the *Statute of Distributions*, and to be brought into hotchpot in estimating the son's share of the intestate's estate.

Cookson, Q.C., and *C. Lyttelton Chubb*, for the son *Thomas* :—

Payment of a son's debts by a father is not an "advancement by portion" of the son by the father within the meaning of sect. 5 of the *Statute of Distributions*. This was the view expressed by

(1) Law Rep. 20 Eq. 155.

Jessel, M.R., in *Taylor* v. *Taylor* (1). If the £1200 was originally a loan from the father to the son, the debt was subsequently released, and the delivery of the returned cheque to the son is evidence of the release, and corroborates the son's own statement. This distinguishes the case from *Hill* v. *Wilson* (2).

Cozens-Hardy, Q.C., and *Farwell*, for another son of the intestate:—

The £1200 was a debt from the son to the father. It is not barred by the *Statute of Limitations*, and at any rate the administrators have a right of retainer.

[PEARSON, J.:—In *Boyd* v. *Boyd* (3) *Wood*, V.C., expressed a different view from that which *Jessel*, M.R., expressed in *Taylor* v. *Taylor*.]

In *Lowther* v. *Bentinck* (4) *Jessel*, M.R., held that under an advancement clause in a will the trustees might apply part of the fund in paying debts of the beneficiary.

There is no real corroboration of the son's evidence; evidence which is consistent with either of two views is not corroborative of either: *In re Finch* (5). The delivery of the returned cheque to the son amounted to no more than an expression of the father's intention not to sue the son for the £1200 as a debt. If the loan was converted into a gift, that does not prove that it was not a gift by way of advancement.

Beddall, for the administrators, referred to *Gilbert* v. *Wetherell* (6).

Jason Smith; *Mulligan*; and *Bramwell Davis*; for other parties.

PEARSON, J.:—

The intestate's son *Thomas*, being in debt, applied to his father, and he gave him a cheque for £1200 to enable him to pay his debt. Mr. *Cookson* has argued that an advance made by a father to a son to enable him to pay his debts, is under no circumstances

(1) Law Rep. 20 Eq. 155.
(2) Ibid. 8 Ch. 888.
(3) Ibid. 4 Eq. 305.
(4) Law Rep. 19 Eq. 166.
(5) 23 Ch. D. 267, 277.
(6) 2 S. & S. 254.

PEARSON, J. 1885 *In re* BLOCKLEY. BLOCKLEY *v.* BLOCKLEY.

an advancement by portion within the statute, and he relied upon what was said by *Jessel*, M.R., in *Taylor* v. *Taylor* (1). With all deference to the Master of the Rolls, I cannot agree in his view. I think that a sum of money given by a father to his son to pay his debts is, or may be, an advancement, as much as a sum of money given him for any other purpose. In *Boyd* v. *Boyd* (2) *Wood*, V.C., said (3), "Wherever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance. The payment of the money is the important thing —the Court does not look to the application. As to the debts, suppose the young man had represented to his father that it was extremely important they should be paid, in order that he might keep his position in the army, and the father had paid those sums in order to assist him, it would have been clearly an advance." I cannot conceive stronger language than that. In my opinion, if a sum of money is paid by a father for the benefit of his son, it is an "advancement by portion." I think the only result of what took place when the returned cheque was delivered by the intestate to his son, was that the £1200, instead of being a loan, became a gift by him to the son. But that leaves the question open whether the £1200 is to be taken into account as part of the son's share of his father's estate. In *Edwards* v. *Freeman* (4) *Raymond*, C.J., said (5), "The intention of making the provisions of the children equal goes throughout the whole Act; first, it gives the two-thirds of the personal estate (the mother being allowed her third) equally among all the children. But then the Act takes it into consideration, that there may be some of the children who have received a portion or advancement before, but not so much as to make up their full share; in that case such child, so advanced but in part, shall have so much more out of the intestate's personal estate as will suffice to make his share equal to that of the other children. The statute takes nothing away that has been given to any of the children, however unequal that

(1) Law Rep. 20 Eq. 155.
(2) Ibid. 4 Eq. 305.
(3) Law Rep. 4 Eq. 308.
(4) 2 P. Wms. 435.
(5) 2 P. Wms. 443.

may have been; how much soever that may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotchpot what he has before received; this manifestly seems to be the intention of the Act, grounded upon the most just rule of equity, equality." I think the intention of the statute was not to disturb anything which had been done by the intestate in his lifetime, but that that which had been done should be taken into account in estimating his children's shares of his estate. That makes the whole of such a transaction between father and son fair. If the father makes a will, saying that he wishes the son to have what he has given him in his lifetime over and above what he has given him by his will, the son will take it. But, if the father dies intestate, the law says, the right rule between children is equality, and, so far as is possible, there shall be equality among the children. Applying that principle to the present case, I take it that there was a gift of the £1200 by the father to the son for the specific purpose of enabling him to pay his debt. To my mind this is within the established rule an advancement of the son, and I must so treat it.

Solicitors: *Deane, Chubb, & Co.; Pritchard, Englefield, & Co.; Roscoe, Hincks, & Sheppard; Beaumont & Warren; Andrews & Ollard.*

W. L. C.

C. A.
1883
KAY, J.
Nov. 10.
C. A.
1885
Jan. 16, 17;
Feb. 14.

In re RUSSELL.
RUSSELL *v.* SHOOLBRED.

[1880 R. 52.]

Assignment of Lease—Right of Assignor to Indemnity—Dilapidations—Mercantile Law Amendment Act, 1856 (19 & 20 *Vict. c.* 97), *s.* 5 [*Revised Ed. Statutes, vol. xii., p.* 1012].

On the dissolution of a partnership between *H.* and *R.*, *H.* assigned to *R.* all his interest in two houses belonging to the partnership held under subleases from *C.* and *D.*, and *R.* covenanted to pay the rents and observe the covenants and keep *H.* indemnified against them. *R.*'s executors sold the houses to *B.*, and *B.* to a company which went into liquidation. The landlords *C.* and *D.* thereupon sued *H.* for the rent, and he paid it for the whole of the year 1882. *D.* also made a large demand against *H.* for breaches of covenants to repair, but *H.* made no payment. On the 15th of March, 1883, *D.* assigned his reversion to *H.*, and in May, 1883, *H.* acquired *C.*'s reversion. In June, 1883, *H.* bought the leasehold interest in both houses from the liquidators of the company, and covenanted thenceforth to pay the rent and observe the covenants. *H.* sought to prove against the estate of *R.* for the sums paid for rent, for the rent payable at Lady Day, 1883, on *D.*'s house, and for the amount of the dilapidations in that house:—

Held, that the right of *H.*, under *R.*'s covenant of indemnity, to prove for the rents which he had paid, was not taken away by his covenant in the assignment by the liquidators, which could not be extended to rents already due and paid:

Held, also, that this right was not defeated on the ground that the right of *R.*'s representatives, if they paid rent, to recover it from the owner of the lease for the time being, was interfered with by the assignment from the liquidators to *H.*, for that this assignment could not take away any right of action which *R.*'s executors might have against the persons entitled to the houses at the end of 1882, and that an assignor who pays rent has no lien on the term, and so cannot be prejudiced by its subsequent assignment:

Held, further, that the right was not defeated on the ground that *H.* on paying the rent became entitled to a right of distress from the reversioners, which he had destroyed by taking an assignment of the leases, and had therefore discharged the estate of *R.* by releasing a remedy to the benefit of which *R.* as a surety was entitled, for that a right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), s. 5:

Held, therefore, that *H.* was entitled to prove against *R.*'s estate for the rent paid in 1882 on both houses:

Held, also, that he was entitled to prove for the Lady Day rent on *D.*'s house:

But *held*, that *H.* was not entitled to prove for the amount of dilapidations, for that he had sustained no damage by reason of them, inasmuch as he bought the leases from the liquidators at a less price in consequence of the breaches of the covenant to repair; nor for the Lady Day rent of *C.'s* house.

MR. *RUSSELL* and Mr. *Hampton* were partners in a business carried on in *Leicester Square*, and in that character they became sub-lessees of four properties for terms, none of which would have yet expired by effluxion of time.

The four leases under which they so held were as follows: (1.) A lease of the 4th of August, 1851, from *Coster* to *Hampton*, and *Russell* of No. 15, *Leicester Square*, referred to as sub-lease No. 1. (2.) A lease of the 6th of April, 1858, from *Cannon* to the same persons of No. 10, *Leicester Square*, referred to as sub-lease No. 2. It was carved out of a term created by a lease of the 27th of June, 1797. (3.) A lease of the 31st of August, 1858, from *Dear* to the same persons of Nos. 1 and 2, *Leicester Place*. This is sub-lease No. 3, which was carved out of a term created by an indenture also of the 27th of June, 1797. (4.) A lease of the same 31st of August, 1858, also from *Dear* to the same lessees of No. 14, *Leicester Square*. This is sub-lease No. 4, and was carved out of a term created by a lease of the 20th of December, 1843. Each of these last two sub-leases contained a covenant by *Hampton* and *Russell* and each of them for payment of the rent, and also, as often as need should require during the term, to repair the demised property.

In 1866, the partnership between *Russell* and *Hampton* was dissolved and thereupon by a deed of the 21st of December, 1866, *Hampton* assigned all his interest under the four sub-leases to *Russell*, and *Russell* covenanted with *Hampton* that he would from time to time and at all times thereafter during the then respective residues of the said several terms of years respectively created by the said four sub-leases, pay the yearly rents by the same sub-leases respectively reserved, and would observe and perform all the covenants and agreements therein contained, and which from the date thereof by or on the part of the lessees were or ought to be observed and performed according to the true intent and meaning of the same sub-leases. And that he, the said *Richard Russell*, his

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executors, administrators, or assigns, or some or one of them, would from time to time and at all times thereafter well and sufficiently save harmless and keep indemnified the said *William Hampton*, his executors and administrators, and his and their lands and tenements, goods and chattels, from and against the said rents, covenants, and agreements, respectively, and every breach, default, or neglect of or in payment or performance thereof, which should at any time or times thereafter happen to be made.

In 1879, *Russell* died, and on the 1st of October, 1880, *Russell's* executors assigned to *Bompas* the property demised by the four sub-leases, and by another deed bearing date the 1st of December, 1880, *Bompas* assigned the same property to the *United Service Supply Association.*

On the 11th of May, 1881, the association sub-demised the same property for the full terms created by the four sub-leases, except the last day of each term, to *Everitt* and *Shearman* as trustees for certain debenture holders of the association. On the 14th of July, 1881, the association passed an extraordinary resolution for winding up, and by an order of the 16th of July, 1881, the winding-up was continued subject to supervision. *Everitt* and *Shearman* were the liquidators.

After the winding-up began, the rents under the four sub-leases fell into arrear, and at and before Christmas, 1882, demands were made by the lessors under the four sub-leases against *Hampton*, and he made payments and incurred costs in respect of such demands amounting to upwards of £1000, the whole of which rent, except a quarter's rent due on Lady Day, 1883, under sub-lease No. 1, accrued during the year 1882. At the same time demands were made by *Dear* on *Hampton* for a sum of £1640 in respect of breaches of the covenants to repair contained in sub-leases 3 and 4, but no payment was made to *Dear* in respect of such claim.

The first question in the case was as to the liability of *Russell's* estate for the payments made by *Hampton* in respect of the rent due before or at Christmas, 1882.

Hampton, apparently influenced by the claims of *Dear* in respect of the covenants to repair, made terms with him for the

purchase from him of his terms of years in reversion expectant on the terms created by the sub-leases 3 and 4, and by deed of the 15th of March, 1883, *Dear* for a valuable consideration assigned to *Hampton* these reversionary terms. *Hampton* thus became landlord of Nos. 1 and 2, *Leicester Place* and 14, *Leicester Square*, as against all persons claiming under sub-leases 3 and 4.

On the 25th of March, 1883, another quarter's rent accrued on all four sub-leases. That on No. 1 was paid, but that on the others was never paid. Another question related to this rent which had not been paid.

On the 22nd of May, 1883, by an assignment of that date, the term immediately in reversion on the sub-lease No. 2 was assigned to *Hampton*, who thus became the immediate landlord in respect of that sub-lease.

On the 1st of June, 1883, *Everitt* and *Shearman*, in pursuance of an order of the High Court in a suit of *Naylor* v. *United Service Supply Association*, executed to *Hampton* for a nominal money consideration an assignment of all the hereditaments demised by the four sub-leases, and the interest of *Everitt* and *Shearman*, as trustees and liquidators in the same, subject to the payment of the several rents and the performance of the covenants contained in the sub-leases, and which on the part of the lessee ought to be paid and performed. And by the same indenture *Hampton* covenanted with *Everitt* and *Shearman* that he would thenceforth pay the several rents by the sub-leases reserved, and perform all the covenants therein contained.

Sometime before the 23rd of July, 1883, *Hampton* entered into an agreement with Her Majesty's Postmaster-General for the sale to him of *Hampton's* interest in the property, and on that day (the 23rd of July, 1883), the Postmaster-General was put into possession of the property. This agreement was subsequently, and after the order now under appeal was made, carried into effect by an indenture of the 19th of March, 1884. This deed recited the two leases of the 27th of June, 1797, and the lease of the 20th of December, 1843, out of which the sub-leases 2, 3, and 4 were respectively created, and also the sub-lease No. 1, and also recited that by divers assurances, acts in the law, and events, and by the entry of *Hampton*, the several terms of years granted by the sub-leases 2, 3, and 4 had been determined. And in accordance

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with this recital, *Hampton*, in consideration of £3500 paid by the Postmaster-General, assigned to him the properties comprised in the two leases of the 27th of June, 1797, and the lease of the 20th of December, 1843, and in the sub-lease No. 1, to hold the first three properties for the residues of the terms created by the two leases of the 27th of June, 1797, and the lease of the 20th of December, 1843, respectively, thus treating the sub-leases 2, 3, and 4 as no longer existing, and as to the property comprised in sub-lease No. 1, for the residue of the term created by the deed of the 11th of May, 1881, and also, "but subject to such legal estate, if any, as remained vested in the said association," for the residue of the term of years granted by the sub-lease of the 4th of August, 1851.

The estate of *Russell* was being administered in this action, and *Hampton* took out a summons asking to be allowed to prove for what he had paid in respect of rent of the different properties for 1882, for the rent accrued due at Lady Day, 1883, and for the dilapidations in the properties comprised in sub-leases 3 and 4, and for certain costs.

The summons was heard before Mr. Justice *Kay* on the 10th of November, 1883.

Hastings, Q.C., and *Stock*, for *Hampton*, contended that under the covenant in the assignment of 1866, *Russell* was clearly liable to indemnify him for any payment which he might be called upon to make under the four leases. All the properties passed to the association, and the liquidators of the association assigned to *Hampton*, as they could properly do, all their interest, but the right of *Hampton* to be repaid the sums which he had paid, and for which it was sought to make him liable prior to the date of the liquidator's assignment, was not lost or altered. *Hampton* was not able to obtain repayment of the sums which he had paid, nor could he obtain the indemnity to which he was entitled, and consequently he took out this summons to have his rights determined and to be secured out of *Russell's* estate.

Beddall, for the Defendants, the executors of *Russell*, opposed the application:—

There were various assignments of these properties, and in

June, 1883, the liquidators of the association, in whom *Russell's* interest in the properties had become vested, assigned the whole of that interest, which they had full right to do, under the *Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 95, sub-s. 3, to *Hampton*, and he became liable to the *mesne* assignors. As regarded the rents which *Hampton* had paid, they were in the nature of a charge upon the properties, and *Hampton* purchased from the liquidators, with notice that they were unpaid by the persons primarily liable to pay them, and he was not entitled to be repaid out of *Russell's* estate: and as regarded the claim for dilapidations, *Russell* was in the position of a surety for the persons primarily liable, and as the properties had become vested in *Hampton*, he became primarily liable to put the premises into good repair, and he could not make *Russell's* estate recoup him for so doing.

KAY, J. (after stating all the facts as above set forth, continued):—

It has been proved before me that after *Hampton* assigned all his interest to *Russell* in 1866, and before the assignment by the deed of June, 1883, to him, claims were made upon him under the original leases to *Hampton* and *Russell* for sums due for rent in respect of the properties. These sums come under the clause in the deed by which *Russell* bound himself to indemnify *Hampton* and his estate, and accordingly *Hampton* now claims in the administration of *Russell's* estate to have the sums which he has paid repaid to him out of that estate, and as he has paid them, I hold that he is entitled to be repaid with interest thereon. *Hampton* also claims to be repaid certain costs incurred in an action which was brought against him by one of the original assignors in respect of rent which had become due and not paid. Those costs were no doubt incurred, and as to them I think he must be indemnified. It was said that some of the costs were incurred in respect of a claim made for dilapidations, and that so far as they are concerned *Russell's* estate ought not to be liable; but it appears that the action did not go on to the end, and though some of the costs might have been incurred in respect of the claim for dilapidations, I cannot make any separation of

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those costs and those which were incurred by *Hampton* in the action, and therefore I hold that *Russell's* estate must indemnify *Hampton* against the payment of them.

With regard to the claim for dilapidations. It appears that in June, 1883, *Hampton* took an assignment from the liquidators of all the properties comprised in the four sub-leases. There was no actual merger, and his right to sue *Russell* remained at law. What defence could *Russell* or his executors have made to an action? His covenant was valid, and there was a continuing breach. There could have been no possible defence at law. Suppose an action had been brought against *Russell*, could he under the old practice have filed a bill in Equity to restrain it? I think not, but it was suggested that he could, because *Hampton* took an assignment of the whole of the properties from the liquidators, and became liable to the original lessors. Still he had a right to sue *Russell*, who was an original lessee, and I do not see what could have been done to prevent the assertion of the right which he had against the estate of *Russell*. I have been told that *Hampton* has agreed to sell all these properties to the Postmaster-General, and that the Post Office authorities, in considering the price which should be paid, looked at the continuing breach for dilapidations, and proposed to pay a less sum to *Hampton* because of the sum which would have to be paid for dilapidations. The contract is not yet carried out; but if *Russell* had performed his covenant, and made good the dilapidations, the sum to be paid by the Postmaster-General would not have been diminished. Clearly then, in respect of this claim for dilapidations, *Hampton* has a valid claim against *Russell's* estate to the extent which the dilapidations existed at the time when *Hampton*, in June, 1883, contracted to assign to the Postmaster-General. There must be a declaration that *Hampton* may prove as for damages in respect of the breach of covenant for dilapidations up to the 1st of June, 1883, and there must be an inquiry as to how much *Hampton* will be entitled to receive from *Russell's* estate for the rents which he has had to pay, and for the costs which he has incurred in respect of the action.

The order declared that *Hampton* was entitled to prove for breach of the covenant under the leases to pay rent for the

quarter day which accrued due at Lady Day, 1883, together with interest thereon at 4 per cent. per annum from the dates of payment of such rent until the repayment thereof, and also for such breaches of the covenant to repair and reinstate the premises contained in the leases as accrued before the 1st of June, 1883. An inquiry was directed what *Hampton* was entitled to prove for in respect of the breaches of the aforesaid covenants, and ordered that he should stand as a creditor for £1152 17*s.* 8*d.* (being £1122 4*s.* 3*d.* and £30 13*s.* 5*d.* for agreed interest thereon at 4 per cent. per annum up to the date of the order), and what should appear to be due on making such inquiry.

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The £1122 4*s.* 3*d.* was made up of sums which had been paid by *Hampton* for rent on the four properties, including the rent due Lady Day, 1883, under sub-lease (1), for the costs of an action by *Dear* against *Hampton*, and for fire insurance and surveyor's fees.

T. F. M.

The Defendants appealed from this decision, and the appeal was heard on the 16th and 17th of January, 1885.

C. A.

Rigby, Q.C., and *Beddall*, for the appeal:—

We contend that the claim of *Hampton* is altogether bad. Being liable to the rent only in the character of a surety, he no doubt could call on *Russell* to indemnify him. But *Russell* or his representatives had a right to say—give us the remedies against the property—the right of distress, and all other remedies which the landlord had. *Hampton* having destroyed these remedies by his purchases cannot have the indemnity. From the time he became owner of the tenements he became the person primarily liable to the rent and covenants. As to the covenant to repair, *Hampton* bought the property cheap because it was out of repair, so he is not seeking indemnity but profit. The *dicta* in *Wolveridge* v. *Steward* (1) shew that the assignee of a lease, apart from any express contract, is primarily liable to the rents and covenants during the continuance of his estate, and that the original lessee is in the position of a surety. *Moule* v. *Garrett* (2) adopts that view. The original lessee was there held entitled to recover from

(1) 1 C. & M. 644, 659, 660. (2) Law Rep. 5 Ex. 132.

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the ultimate assignee rent which he had been obliged to pay, and that although there was a chain of covenants on which another remedy could have been had. The majority of the Court put it on the footing of principal and surety. In the decision on appeal (1) there is not a word disapproving of the judgment of the Court below. Mr. Justice *Blackburn* expressly adopts it, and what the other Judges say comes really to the same thing. In *Lord Harberton* v. *Bennett* (2) the plaintiff had got the land back again, and sued in respect of rent accrued before he got it in. It was held that he could not recover because he had deprived the surety of his remedy against the estate. We were entitled under the *Mercantile Law Amendment Act*, 19 & 20 Vict. c. 97, s. 5, to use all the remedies which the principal creditor had.

[BOWEN, L.J.:—Does that clause apply to anything which would not be the ground of an action or suit?]

We contend that the effect of the clause is wider, its intention evidently was to put the surety who has paid the debt in the position of the creditor as against the principal debtor.

[BOWEN, L.J.:—If the rent is paid the right of distress is gone. How do you keep it alive? The right of action in other cases is expressly provided for.]

Distress may properly be considered a proceeding at law, and it is according to the spirit of the section to treat it so. Though *Russell* was at first a principal he could become a surety by subsequent transactions: *Oakeley* v. *Pasheller* (3), observed upon by Lord *Cairns* in *Overend, Gurney, & Co.* v. *Oriental Financial Corporation* (4). There may be suretyship without express contract, as in the case of successive indorsers of a bill of exchange. As regards repairs, *Hampton*, as soon as he had purchased, became the person primarily liable to repair. The breach of the covenant to repair is a continuing breach, so the landlord could at once have sued him on the covenant. He bought sub-leases 3 and 4 at a low price on the ground of this liability, and therefore has suffered no damage by the breach of the covenant to repair.

(1) Law Rep. 7 Ex. 101.
(2) Beat. 386.
(3) 4 Cl. & F. 207.
(4) Law Rep. 7 H. L. 348, 360.

Hastings, Q.C., and *Stock*, for *Hampton* :—

The claim is threefold—1, for rent up to December, 1882, inclusive on all the property; 2, for the Lady Day rent for the property purchased from *Dear*; 3, for dilapidations. The right to indemnity as to these is *primâ facie* plain. The Appellants contend that this is released as to the purchased properties on the ground that *Hampton* has by his purchase destroyed the remedies to the benefit of which the surety was entitled, and that by taking an assignment of the property he made himself primarily liable to the rent and covenants. But what remedy against the land could be lost by the assignment? The right of distress is not one which could be assigned; it is gone by payment, and the *Mercantile Law Amendment Act*, though it keeps some remedies alive, does not apply to a landlord's right of distress. As to the other point, a person does not, by the mere fact of taking an assignment of a lease, make himself liable to pay past rent. The express covenant usually inserted is that the assignee will pay the rent and observe the covenants from that time, and the implied covenant goes no further. The right then as regards the rent for 1882 is clear. As to the rent at Lady Day, 1883, on *Dear's* property, the assignment by *Dear* being made before Lady Day carried the right to this rent. The third claim is by *Hampton* as landlord for breach of the covenant to repair. His right to sue *Russell* for the purpose of obtaining an indemnity against that covenant could not be lost by his subsequently, through a transaction to which *Russell* was no party, becoming liable to the superior landlord.

Rigby, in reply.

1885, Feb. 14. The judgment of the Court (*Baggallay*, *Bowen*, and *Fry*, L.JJ.) was now delivered by

FRY, L.J., who, after stating the facts in nearly the same words as above, proceeded as follows :—

Hampton now claims from *Russell's* estate, in the first place, the amount of rent paid and expenses incurred in respect of rent under the four sub-leases down to Christmas, 1882. Under the terms of the covenant in the deed of 1866 *Hampton* has a clear

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primâ facie claim to this payment. Was this right altered or lost by *Hampton's* acquiring all *Everitt* and *Shearman's* interests in the sub-leases by the assignment of the 1st of June, 1883, and entering into the covenant thenceforth to pay the rents? It appears to us that *Hampton's* covenant to pay the rents could not be construed as relating to rents already accrued and already paid, and consequently that it could not affect *Hampton's* claim.

But it is argued that the fact of *Hampton's* taking an assignment of the sub-leases has determined his right against *Russell's* estate on the covenant. This is put in two ways.

In the first place, it is argued on general principles of law that if *Russell* paid the rent under his covenant with *Hampton*, *Russell* had a right to recover that rent from the actual occupier of the estate as the person primarily liable to the rent, and it is suggested that this right was interfered with by the assignment taken by *Hampton*. But we are unable to see how this assignment could affect any right of action which *Russell* might possess against the association or the trustees, or whomsoever may have been in possession at Christmas, 1882. The terms created by the sub-leases were, it was argued, a property or fund against which *Russell* had a right of recourse, but no case was cited, and we know of no principle which would create a lien on the terms in the hands of an assignee in favour of an assignor who had paid rent.

In the next place, it was argued that *Hampton* having paid the rent in arrear became entitled from the reversioners to a right of distress, and that upon *Russell's* re-payment of the same rent to *Hampton* he would have been entitled to an assignment from *Hampton* of this same right of distress, and that *Hampton*, by taking an assignment of the sub-leases, destroyed his right of distress. This contention is based on the 5th sect. of the *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97), which, so far as relevant, is as follows:—

"Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other

security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him."

It is argued that the effect of this section in the present case was, first, to keep alive the right of distress which was otherwise extinguished by *Hampton's* payment, and, secondly, to transfer this right to *Hampton*, and from *Hampton* to *Russell*. Is the right of distress for rent in arrear, a security held by a creditor in respect of a debt, within the meaning of this section? We think that it is not. In the first place, the right of distress is not in common parlance, nor we think, in legal phraseology, a security held for a debt, it is a particular remedy which arises on non-payment; in the second place, the section appears to be dealing with securities, which, according to the existing law, are in their nature assignable, which is not the case with the power of distress for rent in arrear, which, according to the Common Law, was only incidental to the immediate reversion; and, lastly, we think that the preamble is strong to shew that the Legislature had no intention of effecting a great change in the law regulating the relations of landlord and tenant, for it recites, "Whereas inconvenience is felt by persons engaged in trade by reason of the laws of *England* and *Ireland* being in some particulars different from those of *Scotland* in matters of common occurrence in the course of such trade, and, with a view to remedy such inconvenience it is expedient to amend the laws of *England* and *Ireland* as hereinafter is mentioned."

But if the right of distress is not a security within the meaning of the section, is it one of the remedies all of which the person paying the debt is entitled to use? The precise construction of

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the clause and the precise meaning of the phrase "all the remedies" is not easy to ascertain; but we think that the remedies are confined to proceedings at Law or in Equity in which, but for the statute, the payment might have been pleadable, and it is evident that payment could not have been pleaded to a distress.

We are, therefore, of opinion that the estate of *Russell* is still liable for the rent paid by *Hampton* up to Christmas, 1882, and as nothing has been adduced to us to shew that the expenses coupled with the rent by the order of the Court below do not follow the same rule, we think that this part of the order cannot be disturbed.

The second inquiry is this. Is the estate of *Russell* liable to *Hampton* for the rent which accrued due at Lady Day, 1883, under the sub-leases 3 and 4, the reversions on which had ten days previously been assigned by *Dear* to *Hampton*. Here, *Hampton* claims under two titles, first, under the covenant by *Russell* contained in the sub-leases, and secondly, under *Russell's* covenant of 1866. In either view *Russell* is liable for the amount of rent. If the covenant in the deed of 1866 regulates the rights of the parties, *Hampton* was under that covenant in our opinion entitled to recover from *Russell*, by way of damages for the breach of the covenant to pay the rent, the amount of loss actually sustained by *Hampton*. Now here, the loss sustained by *Hampton* as landlord was the full amount of rent. Is it any objection that the loss was sustained by him in the character of landlord? We think not, because looking at the past history of the case we think that he would have sustained an equal loss if he had not become the landlord, *i.e.*, he would have to pay the same amount to the landlord. We think, therefore, that he is entitled to recover the actual loss sustained by him, as that loss is not shewn to have been increased by his change of circumstances. But even if this is not so, *Russell* would in any event be liable under his sub-lease to pay the rent, and that liability is not extinguished because *Hampton* had become the landlord.

With regard to the quarter's rent due Lady Day on the sub-lease No. 2, we think that *Hampton* is not entitled to recover damages. By the assignment to him in May following of the lease in reversion on that sub-lease he acquired no right to the

past rent, and he has not been called upon to pay the rent by the previous owner of that reversionary lease. As he has suffered no loss either as landlord or tenant by *Russell's* default in payment of the rent, we think that he is not entitled to recover damages.

The last claim arises from the facts that the sub-leases Nos. 3 and 4 contained covenants to repair, that *Russell*, by the deed of 1866, covenanted to perform those covenants, and that the property comprised in these sub-leases was allowed to fall out of repair. Under these circumstances, *Hampton* claims from *Russell's* estate the full amount which it would cost to put the property into repair. Now it appears to us that the measure of damages which *Hampton* is entitled to recover from *Russell* under the covenant of 1866, is the actual loss sustained by *Hampton* by reason of *Russell's* breach of his covenant. *Hampton* alleges, and no doubt with truth, that if the property had been in repair he would have received a larger sum from the Post Office on his sale, to which it is replied, that in the same contingency he would have had to pay more on his purchase from the liquidators of the *United Service Supply Association*, and probably also on his purchase of the reversions expectant on sub-leases 2, 3, and 4. Each of these propositions appears to us to be true. We have no evidence to shew whether the sum he might have received from the Post Office if the property had been in repair was larger than the sum which in the same contingency he would have had to pay, and, therefore, he has not satisfied us that he is entitled to damages in respect of the breach of the covenant to repair.

As no argument has been addressed to us with regard to interest on the rent paid by *Hampton*, we express no opinion on the point, and do not interfere with the order of the Judge below on that point.

The order of Mr. Justice *Kay* must be varied by striking out the declaration of a right to prove for the breaches of the covenants to repair and reinstate and the consequential inquiries, and by confining the declaration as to the right to prove in respect of rent due on Lady Day, 1883, to sub-leases 3 and 4.

We give no costs of the appeal.

Solicitors for Appellants: *Lumley & Lumley.*
Solicitors for *Hampton*: *Dixon, Ward, & Co.*

H. C. J.

C. A.

1884

Dec. 3, 10, 15, 16, 17.

1885

Feb. 21.

DE MORA *v.* CONCHA.

[1860 D. 101.]

Res Judicata—Estoppel—Judgment in rem—Finding on Issues on which Judgment in rem is founded.

A native of *Chili* made his will in *London*, in November, 1859, and died in February, 1860. A caveat having been entered on behalf of the testator's daughter, the will was propounded by the executors in solemn form, the executors alleging that the testator was domiciled in *England*. The daughter alleged that the testator was domiciled in *Chili*, and that his will was not executed according to Chilian law. In July, 1860, the Judge of the Probate Court made a decree by which he pronounced for the validity of the will, found that the testator was domiciled in *England*, and decreed probate to the executors. In September, 1860, the executors filed a bill against the residuary legatee and a pecuniary legatee for administration of the estate, in which a decree was made in November, 1860. In 1862, the daughter filed a bill against the executors, alleging that the testator was a domiciled Chilian, that his will being executed in *England*, according to English law, was good by the law of *Chili*, but so far only as the testator could by the law of *Chili* dispose of his property by will; that according to that law he could only dispose by will of one-fourth of his personal estate, and that the other three-fourths belonged to the Plaintiff. The executors by answer set up the decree of the Probate Court as a bar, and no further steps were taken in the suit. In 1877, an order was made staying proceedings in the latter suit, and in another suit, but giving liberty to any of the parties to apply to add to the decree in the former cause all accounts and inquiries necessary to determine all questions in the suits so stayed. Pursuant to this leave, the daughter and her husband applied to add to the decree inquiries as to the legitimacy of the daughter and the domicil of the testator, and as to what part of his personal estate he could according to Chilian law dispose of by will, and an order was made in 1878 directing inquiries as to the legitimacy, the rest of the application to stand over. In 1881 and 1882 orders were made transferring the conduct of the cause from the Plaintiff, the surviving executor, to the residuary legatee, dispensing with service of any notices or proceedings on the Plaintiff, and appointing the residuary legatee to represent the estate of the testator in the cause. In 1884 the application for an inquiry as to domicil was renewed against the residuary legatee, but without notice to the Plaintiff, and *Bacon*, V.C., made an order directing the inquiry as asked. The residuary legatee appealed:—

Held, that the decree of the Probate Court was not conclusive *in rem* as to the domicil, for that it did not appear that the decree was necessarily based on the finding as to domicil. And *quære*, whether the findings on which a judgment *in rem* is based are in all cases conclusive against the world.

Held, further, that the finding by the Probate Court as to domicil was

not binding *inter partes* as between the daughter and the residuary legatee, for that it was a finding between the daughter and the executors, that the executors could not by litigating in that suit a question of domicil, which it was not necessary to decide for the purposes of the suit, conclude the residuary legatee as to the extent of the testator's power of disposing of his property, and did not represent him for that purpose, and that as the residuary legatee was not bound, the daughter could not be bound, since estoppel must be mutual.

Held, therefore, that the inquiry was properly directed, and this notwithstanding that the application had not been served on the executor.

An application by counsel for the executor for leave to be heard on the appeal was refused.

THIS was an appeal by *Juan José de la Trinidad Concha* and *Felicia Gillett* seeking to vary an order of Vice-Chancellor *Bacon* by omitting an inquiry which had been ordered as to the domicil of *Juan José Concha* in an action in which *José Maria de Mora* (since deceased) and *Theodore Mannequin* were Plaintiffs, and *Juan José de la Trinidad Concha* and *Felicia Gillett* were Defendants, the application for such an inquiry having been made by *Manuel Antonio Concha* and *Adelinda* his wife. The part of the order to which the Appellants objected was as follows:—"An inquiry what was the domicil of the said *Juan José Concha* at the time of his death, and what part of his personal estate the said *Juan José Concha* according to the law of such domicil was able to dispose of, and did effectually dispose of, by his will, and who according to the law of such domicil was at his decease entitled to so much of his personal estate as was not effectually disposed of by such will, and who is now entitled thereto."

The Appellants objected to this inquiry on the ground that the domicil of *Juan José Concha* had already been decided against *Adelinda Concha* in a probate suit, in which the Probate Court, on the 18th of April, 1860, admitted to probate the will of *Juan José Concha*.

Juan José Concha, the testator, was a native of *Chili*, who died in *France* on the 8th of February, 1860, having previously made his will in *London*, dated the 29th of November, 1859. By this will he had appointed *José Maria de Mora* and *Theodore Mannequin* his executors, and constituted his son, *Juan José de la Trinidad Concha*, the first named Defendant, his universal heir and residuary legatee, after certain legacies, among which was

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one to the second named Defendant, *Felicia Gillett*, mother of *Juan José de la Trinidad Concha*.

During the lifetime of the testator, litigation had commenced between him and his brother, *Ramon Concha* (also a Chilian by birth), who had married *Adelinda Concha*, a daughter of *Juan José Concha*. This litigation was in respect of certain bonds, to a portion of which *Ramon* claimed to be entitled in right of his wife, *Adelinda*, on the death of *Adelinda's* mother, *Maria*, upon the alleged ground that *Maria* had been the lawful wife of the testator, and *Adelinda* his legitimate daughter by her, and that by Chilian law, upon the death of *Maria*, *Adelinda*, as her daughter, had become absolutely entitled to one moiety of all the property gained or acquired by her father and mother, or either of them, during their marriage, and that *Ramon*, according to the laws of *Chili*, on his marriage with *Adelinda* had become entitled to the receipt and control of his wife's property. On the part of *Juan José Concha*, his marriage with *Maria* and the legitimacy of her daughter *Adelinda* were denied in such litigation.

In the year 1858, three English suits were begun by *Juan José Concha* against the bankers into whose hands the bonds or a portion of them had passed.

1. The suit of *Concha* v. *Murietta* and others (1858 C. 228).
2. The suit of *Concha* v. *Greening* and others (1858 C. 227).
3. The suit of *Concha* v. *Tayler* and others (1858 C. 229).

And a cross suit was also instituted in respect of the same bonds by *Ramon Concha* in 1859 against *Juan José Concha* (1859 C. 217).

On the 8th of February, 1860, *Juan José Concha* died, leaving his will as above mentioned. A caveat having been entered on behalf of *Adelinda* and her then husband, *Ramon*, the will was propounded in solemn form by the executors, *José Maria de Mora* (since deceased), and *Theodore Mannequin*, who alleged, among other things, that *Juan José Concha* had acquired before his death an English domicil. On behalf of *Adelinda* it was alleged, on the other hand, both that *Juan José Concha* was a domiciled subject of *Chili* at his death, and also that the will and codicil were not executed in accordance with the forms and requisites of the law of *Chili*. The cause came on for trial before the late Sir

Cresswell Cresswell, who on the 28th of July, 1860, pronounced a decree, which was as follows:—

"The Judge . . . . by his final decree pronounced for the force and validity of the last will and testament of *Juan José Concha*, the deceased in this cause, with a codicil thereto, bearing date respectively the 29th day of November, 1859, and that the said deceased was at the time of the date of the said will, and also at the time of his death, a domiciled Englishman, and decreed probate of the said will and codicil to *José Maria de Mora* and *Theodore Mannequin*, the executors named in the said will, but made no order as to costs."

On the 12th of September, 1860, *José Maria de Mora* and *Theodore Mannequin*, as executors of *Juan José's* will, instituted an administration suit in the Court of Chancery against *Juan José de la Trinidad Concha* and *Felicia Gillett* as Defendants, for the administration of the estate of their testator, *Juan José Concha* (1860 D. 101). On the 24th of October, 1860, *Ramon Concha* died, leaving his widow, *Adelinda*, his sole executrix.

On the 17th of November, 1860, an order was made in the administration suit *De Mora* v. *Concha* (1860 D. 101), decreeing performance of the trusts of *Juan José's* will, and directing accounts and inquiries.

On the 27th of January, 1862, a bill was filed by *Adelinda Concha* against *Theodore Mannequin* and *José Maria de Mora*, the executors (1862 C. 19), alleging that *Juan José Concha* was at the time of his death a domiciled Chilian, and that his will having been executed in *England* with the formalities required by English law to render wills valid in *England*, was valid according to the law of *Chili* to the extent to which as a domiciled Chilian the testator could by the laws of *Chili* dispose of his property by will, but not further or otherwise, and alleging that the will had been proved in Her Majesty's Court of Probate. The bill alleged that *Juan José Concha* had left surviving him no widow and no issue other than the Plaintiff, and that in consequence thereof, according to the law of *Chili*, one-fourth only of his personal property passed by or was subject to his will, and the other three-fourths, subject to their due proportion of his debts and liabilities, devolved

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upon his death on the Plaintiff as his only child. The bill prayed for a declaration that *Juan José Concha* at the time of his death had a Chilian domicil, and that three-fourths of his personal estate, subject as aforesaid, had devolved on the Plaintiff, and for the necessary directions to be made on this footing.

The executors put in an answer, setting up the decree of the Probate Court as a bar to the suit. No further steps were taken in the suit.

Adelinda Concha subsequently married her present husband, *Manuel Antonio Concha*. All necessary orders of revivor were made from time to time in the above-mentioned suits.

On the 12th of July, 1876, a writ was issued in the Chancery Division of the High Court (1876 C. 238) by *Manuel Antonio Concha* and *Adelinda* his wife against *Theodore Mannequin*, the then surviving executor. This writ was indorsed with a claim that in addition to the relief already claimed it might if necessary be declared that *Adelinda Concha*, or her late husband *Ramon* in her right, had become entitled on the death of her mother, *Maria*, to one-half of all the gananciales or acquisitions during coverture of the Plaintiff's father, *Juan José Concha*, and her mother, or either of them, and that the estate of *Juan José Concha* was indebted to *Adelinda*, or to her husband *Manuel*, to that extent.

On the 14th of February, 1877, an order was made by the Court of Appeal in the above suits (1858 C. 228; 1858 C. 227; 1858 C. 229; 1859 C. 217; 1860 D. 101; 1862 C. 19; and 1876 C. 238) upon the appeal of *Adelinda* and *Manuel Antonio Concha*, whereby it was ordered that the four causes of *Concha* v. *Murrieta* (1858 C. 228), *Concha* v. *Gruning* (1858 C. 227), *Concha* v. *Taylor* (1858 C. 229), and *Concha* v. *Concha* (1859 C. 217), with the causes reviving the same, should be consolidated, and that all further proceedings in the original cause of *Concha* v. *Mannequin* (1862 C. 19), and in the revived cause, and in the action of *Concha* v. *Mannequin* (1876 C. 238), should be stayed, "with liberty to any of the parties to apply in the said cause of *De Mora* v. *Concha* (1860 D. 101) to add to the decree in the last-mentioned cause, dated the 17th of November, 1860, all accounts and inquiries necessary to determine all questions in the said

causes and action in which further proceedings were thereby ordered to be stayed."

In the year 1878 an application was made on behalf of *Manuel Antonio Concha* and *Adelinda* his wife in the last-mentioned cause (1860 D. 101), that, in addition to the accounts and inquiries directed by the decree of the 17th of November, 1860, inquiries should be directed as to the marriage and issue of *Juan José Concha*, and also as to the domicil of *Juan José Concha* at the time of his death, and what part of his personal estate *Juan José Concha*, according to the law of his domicil, was able to dispose of and did dispose of by will, and who, according to the law of such domicil, was at his decease entitled to so much of his personal estate as was not effectually disposed of by will, and that the applicants *Adelinda* and *Manuel Antonio Concha* might be at liberty to attend the proceedings under the decree. On this application Vice-Chancellor *Bacon* on the 20th of July, 1878, ordered an inquiry "whether *Juan José Concha*, the testator, was ever married, and if so, when and to whom, and whether there was any and what lawful issue of any and what marriage of *Juan José Concha*," and ordered that the rest of the application should stand over till after such inquiry should have been made, with liberty to any of the parties to apply to the Court as they might be advised.

On the 24th of June, 1881, the Court ordered the conduct of the cause *De Mora* v. *Concha* (1860 D. 101) to be transferred from *Theodore Mannequin*, the surviving executor, to the Defendant *Juan José de la Trinidad Concha*.

On the 23rd of February, 1882, Vice-Chancellor *Bacon* made a further order in *De Mora* v. *Concha* "that the service of any notices or proceedings upon the Plaintiff *Theodore Mannequin* be dispensed with, and it is ordered that for all purposes the Defendant *Juan José de la Trinidad Concha* be nominated to represent the estate of the testator in this cause."

In 1884 it was found, in answer to the last-mentioned inquiry, that the testator had been married to *Maria*, the mother of *Adelinda*, and that *Adelinda* was the only issue; and on the 19th of July, 1884, an order was made in the last-mentioned cause, *De Mora* v. *Concha* (1860 D. 101), on the application of *Manuel Antonio Concha* and *Adelinda* his wife, served on the residuary

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legatee but not upon the executor, that in addition to the accounts and inquiries directed by the decree dated the 17th of November, 1860, and to the inquiry directed by the order of the 20th of July, 1878, there should be made, amongst other inquiries, the inquiry which has been already mentioned. From this part of the order the Defendants *Juan José de la Trinidad Concha* and *Felicia Gillett* now appealed.

H. Matthews, Q.C., *Hemming*, Q.C., and *Edmund James*, for the Appellants :—

[They stated that they appeared also for *Mannequin*, but the Court held that as *Mannequin* was not a party to the order in the Court below he could not appeal, and in fact the notice of appeal had not been given on his behalf. The appeal must therefore be argued on behalf of the beneficiaries only.]

We say that *Adelinda* is estopped from re-opening the question of domicil as against the residuary legatee, and if not, still, that after this lapse of time and change of circumstances the question ought not to be re-opened.

As to estoppel, there are two rules which are to be kept distinct. The judgment of a Court of competent jurisdiction, if not appealed against, concludes the matter adjudicated upon as between the parties and those claiming under them; that is one part of the doctrine. Another is, that wherever an allegation of fact is made on the record and issue taken upon it, and that issue has been found one way or other and followed by judgment, neither of the parties can afterwards re-open that question of fact. In *Outram* v. *Morewood* (1) the latter proposition was laid down, Lord *Ellenborough* saying (2): "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel." That appears to have been overlooked in *Barrs* v. *Jackson* (3), where *Knight Bruce*, V.C., held (4) that though the judgment was binding, the finding of facts on which it proceeded was not conclusive for all purposes between the parties. This was reversed by Lord *Lyndhurst* (5) in accordance with *Bouchier* v. *Taylor* (6). Lord *Lyndhurst* there

(1) 3 East, 346.
(2) Ibid. 355.
(3) 1 Y. & C. Ch. 585.
(4) 1 Y. & C. Ch. 597-8.
(5) 1 Ph. 582.
(6) 4 Bro. P. C. 708.

accepts the account given by Mr. *Hargrave* (1) of the grounds of the decision, and treats it as binding on him. In *Bouchier* v. *Taylor* (2) the Court of Probate had granted administration to *B.* on the ground that he had proved himself to be next of kin, which had been disputed by *A.*, who claimed to be the next of kin. This was held conclusive as between *B.* and the residuary legatee of *A.* in a suit brought in the Court of Chancery, for the distribution of the intestate's estate. It does not appear in the short statement in Lord *Lyndhurst's* judgment, but it does appear in the report in *Brown*, that the judgment in the Probate Court was between *B.* and the executor of *A.*, *A.* having died pending the proceedings, so the case is similar to the present; a decision against the executor was held to estop the residuary legatee.

[BAGGALLAY, L.J.:—There is this difference between that case and the present, *A.'s* executors did not directly intervene, they only came in to continue an intervention commenced by *A.*]

But they appeared by their proctor as legal personal representatives of *A.* The last application of this principle is in *Priestman* v. *Thomas* (3), where a decision of the Chancery Division that a will was a forgery, was held to estop the parties in a suit in the Probate Division for revocation of the probate, and it was urged in vain that as the suit in the Chancery Division was for a different purpose, being to set aside a compromise and not for the purpose of declaring the will invalid, there was no estoppel.

[BAGGALLAY, L.J.:—Have you any authority to shew that executors in a probate suit represent not only the estate but all persons claiming under their testator's will?]

Bouchier v. *Taylor* goes that length.

[BAGGALLAY, L.J.:—*Mannequin* only represented the estate here if there was a valid will. *Adelinda's* claim is outside the will, and if her view is correct, *Mannequin* stood in no relation to her. She does not claim under the will.]

But she is in litigation with a party who claims to be executor. She says the will is bad. It is decided to be good, and the

(1) Law Tracts, 473. (2) 4 Bro. P. C. 708.
(3) 9 P. D. 210.

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judgment to that effect is an estoppel as between *Mannequin* and *Adelinda*, and equally so as between *Adelinda* and all persons whom *Mannequin* represents. The residuary legatee claims through the executor, he cannot set up as against third parties any title of his own to any part of the estate. We shall contend further that the judgment in the Probate Court was a judgment *in rem*, but, treating it only as a judgment *inter partes*, we say that the residuary legatee was so represented in the proceedings as to be liable to, and to be entitled to the benefit of, estoppel. The only case in which the question whether a judgment against the executor binds the residuary legatee, is *Bouchier* v. *Taylor* (1), but that is a decision of the House of Lords, and in *Barrs* v. *Jackson* (2), Lord *Lyndhurst* appears to treat the executor and the residuary legatee as if they were the same person.

[BAGGALLAY, L.J.:—Assuming that all parties are bound by the decision of the Judge as to probate of the will, are they bound by all the findings on which that decision proceeds?]

That question is answered by anticipation by *Outram* v. *Morewood* (3) and *Priestman* v. *Thomas* (4), which shew distinctly that a proposition of fact, not merely arising incidentally but necessary to the decision, is as much concluded between the parties as the title itself which the judgment establishes.

But we go further and say that a probate judgment is a judgment *in rem*, and binds all the world, not only as to the actual decision but as to the findings of fact on which it is founded. So far as regards the grant of probate it clearly is so, all the world is bound to recognise the person to whom probate is granted as the personal representative, and no one can dispute his being so: *Whicker* v. *Hume* (5).

[BOWEN, L.J.:—I am not clear that a judgment *in rem* makes every conclusion of fact on which it is founded binding on all the world.

FRY, L.J.:—It is for the convenience of mankind that certain things should be determined once for all, so as to bind all the

(1) 4 Bro. P. C. 708.
(2) 1 Y. & C. Ch. 585.
(3) 3 East, 346.
(4) 9 P. D. 210.
(5) 7 H. L. C. 124.

world, *e.g.*, the status of an executor, but it does not follow that it is convenient that all the findings of fact on which such a judgment proceeds should be binding on all the world.]

It would lead to very absurd consequences if a judgment *in rem* could be split into parts. A simple grant of probate would only decide that the will was well executed according to the law of the domicil wherever it might be, and that would not involve a decision what the domicil was, but here probate is granted on the footing of the domicil being English, and that point was decided. The observations of Lord *Wensleydale* in *Whicker* v. *Hume* (1) go to shew that in such a case the finding is conclusive as a judgment *in rem*. A judgment *in rem* must decide conclusively any fact stated as the basis of it, and without which it would be wrong. After the Probate Court has decided that *Juan José Conchá's* will was well executed and that *Mannequin* is his proper representative, on the ground that the testator was domiciled in *England*, it would be most inconvenient that any one should be allowed to dispute his domicil. The cases as to the removal of paupers support our contention: *Reg.* v. *Inhabitants of Hartington* (2).

[BOWEN, L.J., referred to *Hobbs* v. *Henning* (3).]

That decision shews that, in cases of prize, the findings of fact on which the judgment is founded, if they appear distinctly on the judgment, are conclusive.

But supposing the Court against us on the question of estoppel, it would be unjust that the decision of Sir *Cresswell Cresswell* in 1862 should be re-opened after this lapse of time, and when many of the persons whose evidence would have been material are dead. This was the second ground of decision in *Bouchier* v. *Taylor* (4).

Fischer, Q.C., for *Adelinda*:—

It is contended that the judgment of the Probate Court as to domicil between the daughter and the executor concludes the question of domicil as between the daughter and the residuary

(1) 7 H. L. C. 124.
(2) 4 E. & B 780, 792.
(3) 17 C. B. (N.S.) 791.
(4) 4 Bro. P. C. 708.

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legatee, because the residuary legatee claims under the executor. I submit that he does not claim under the executor, but under the will, and that the will confers independent rights on the executor and the residuary legatee. The residuary legatee might have intervened in the probate suit, and the suit settles as regards him the question of testacy or intestacy, but nothing else. The daughter could only have succeeded in that suit by establishing intestacy. An executor represents the estate for most purposes, but the residuary legatee has independent rights. If the executor renounces, the residuary legatee does not lose the residue. The benefit of the decision is vested in the surviving executor, and in him only.

[FRY, L.J.:—The difficulty I feel is this: if you had succeeded in the probate suit you would have taken away everything from the residuary legatee. If you fail, must not your failure enure for his benefit?]

The whole issue in the probate suit was testacy or intestacy, and to that extent our failure does enure for his benefit. I submit that the distinction between the claim of an executor and the claim of a residuary legatee is founded on principle, and *Bouchier* v. *Taylor* (1) does not establish the principle for which the Appellants contend. The litigation in that case was between Dr. *Bouchier* and *Alice Merchant*. Pending the proceedings *Alice* died, and her executors succeeded to her rights. It was the accident of her death that brought them before the Court, and the decision was that they, as representing her, had not proved that she was the next of kin. *Taylor* in that case was held bound because *Alice Merchant* was a party to the litigation; here the testator was not a party.

[FRY, L.J.:—If there had been a judgment against *Alice Merchant* I should understand your distinction, but at her death she was not bound; there was only a *lis pendens* against her.]

The decision was upon the right which she had asserted; here the executors were asserting their own original rights, and the residuary legatee has independent rights, though for some purposes the executor can represent him. As observed by *Knight*

(1) 4 Bro. P. C. 708.

Bruce, V.C., in *Barrs* v. *Jackson* (1), it is not clear whether the decision in *Bouchier* v. *Taylor* (2) went on estoppel or on the special circumstances of the case: the delay and lapse of time.

[FRY, L.J.:—Lord *Lyndhurst* took a different view.]

I ask the Court still to treat that point as open to consideration. Again, there is this distinction, that when *Bouchier* v. *Taylor* and *Barrs* v. *Jackson* were decided the Court which dealt with probate had concurrent jurisdiction in the administration of personal estate. In the recent case of *Spencer* v. *Williams* (3), relating to an intestacy, which has been called a statutory will, the rights of the children of a deceased next of kin were held to be independent of the title of their mother, *Sarah Spencer*, as administratrix of her husband, and so not to be bound by a decision in Chancery in a suit to which she as administratrix was a party. Now, for the purpose of litigating a question of this kind, an administrator is in the same position as an executor; he represents the estate to the same extent. *Sarah Spencer* therefore represented her children to the same extent as an executor represents the residuary legatee, but it was held that they did not claim under her, and as they would not have been bound by a judgment against her they could not treat it as an estoppel against another party to the litigation.

Then as to the effect of the judgment of the Probate Court, it establishes the will and declares the domicil to be English. The only point directly before the Court was whether the document ought to be admitted to probate. Whether the domicil was English and whether the forms of the law of the domicil had been complied with, came before the Court only incidentally. Now the third proposition in the *Duchess of Kingston's Case* (4) is that "neither the judgment of a Court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." Here the point at issue was, Is the document entitled to probate? The only thing that was binding is

(1) 1 Y. & C. Ch. 591, 592.
(2) 4 Bro. P. C. 708.
(3) Law Rep. 2 P. & M. 230.
(4) Sm. L. C. 8th Ed. vol. ii. p. 784, 785.

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the conclusion that it was entitled to probate, and I say that the finding on any issues of fact, though necessary to that conclusion, are not binding as between the parties in another suit brought for another purpose. *Williams*, J. (1) states that the sentences of Ecclesiastical Courts are not in the temporal Courts evidence of any collateral matter, and therefore letters of administration are not even *primâ facie* evidence of the intestate's death.

[FRY, L.J. :—The Court held that the domicil was English, and that the document was executed according to the law of *England*. Do you call those findings, on which the judgment was founded, collateral ?]

Yes. The Court has power to determine them for the purpose of its decision, but not for any other purpose. The Court of Probate since 1857 (2) has had no jurisdiction to distribute the estate, and how can it decide anything for the purpose of distribution ?

[BOWEN, L.J. :—It is put against you that the judgment of the Probate Court is a judgment *in rem*, and that the finding upon which that judgment *in rem* proceeded is, as well as the judgment itself, binding on all the world.]

I submit that the judgment was *in rem* as to the validity of the will, but only *inter partes* on the question of domicil. It is true that the pleadings raise two issues, that the will was not duly executed, and that if it was, it was, according to Chilian law, inoperative. The question whether the domicil was English or Chilian was mentioned on the second point, but that was a point which the Court of Probate had no jurisdiction to decide.

[FRY, L.J. :—I agree that a general judgment in favour of the will would not be evidence of the grounds on which the Court proceeded, but if the judgment shews the grounds the case may be otherwise.]

The authorities shew that the judgment is to be taken as conclusive only for its proper purpose. In *Outram* v. *Morewood* (3) Lord *Ellenborough* so lays down the rule.

(1) Wms. Exors. 7th Ed. pt. 1, bk. vi. ch. 1, p. 562.

(2) 20 & 21 Vict. c. 77, s. 23.

(3) 3 East, 346.

[BOWEN, L.J., referred to *Hobbs* v. *Henning* (1) as summing-up the cases.]

In *Reg.* v. *Hutchings* (2) the basis of the decision of the magistrates in the first case was that the street was a highway repairable by the inhabitants at large, but that was not held binding *inter partes* on a subsequent proceeding.

[FRY, L.J.:—Had the magistrates any jurisdiction to determine that the street was a public highway?

BOWEN, L.J.:—If they had, they found more than could possibly be necessary to support their decision. They had no occasion to decide an affirmative; it was enough to find that the party was not one of the class liable, without finding who were liable.]

In *Whicker* v. *Hume* (3) the question of domicil was raised in the Probate Court, and was an essential element in the decision, yet it was held to be open in a subsequent suit. The judgment of *Willes*, J., in *Nelson* v. *Couch* (4), supports my argument on the first part of the case. In *Bradford* v. *Young* (5), which, however, is under appeal, the grant of probate was held not conclusive as to domicil.

[BOWEN, L.J., referred to *Dalgleish* v. *Hodgson* (6) and other cases referred to in *Hobbs* v. *Henning*.]

[*Fischer* then proposed to read a shorthand note of the proceedings and the judgment of Sir *C. Cresswell* in the probate suit. The shorthand writer was dead, but the gentleman who had been proctor for *Adelinda* in the probate proceedings had made an affidavit as to the correctness of the note. The evidence was objected to, and the Court declined to allow it to be read.]

Rigby, Q.C., with him:—

First, I contend that there is no mutuality, and therefore no estoppel, for that *Trinidad* was not bound by the proceedings in the Probate Court. Secondly, that the decision of that Court as to domicil, being the decision of a Court which had no jurisdic-

(1) 17 C. B. (N.S.) 791.
(2) 6 Q. B. D. 300.
(3) 7 H. L. C. 124.
(4) 15 C. B. (N.S.) 99.
(5) 26 Ch. D. 656.
(6) 7 Bing. 495, 504.

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tion with regard to matters of distribution, is not an estoppel nor even evidence in a suit pending in another Court for distribution. Thirdly, I will consider the Admiralty decisions and the cases as to settlement of paupers, which I contend are exceptions from the general rule, and are not to be extended to other classes of cases.

First, was *Trinidad* bound by the Probate proceedings to which he was not a party, except so far as he may be regarded as having been there in the person of the executors? No case need be cited to shew that if a matter is litigated in the proper Court between *A.* and *B.*, neither of them, nor anyone claiming under either of them, can re-open it. So, if a question arises between *A.* and *B.*, and *B.* dies before litigation, if the matter is decided between *A.* and *B.'s* executors or administrators it is finally concluded. The executors or administrators are *legitimi contradictores*, and stand in the same place as *B.*, and *B.'s* legatees and residuary legatees, or his next of kin, as the case may be, are bound. In *Bouchier* v. *Taylor* (1), when once the question was got over whether a decision of the Court of Probate was to govern the Court which was administering the estate, there was no difficulty. The claim was one by *Alice Marchant*, and a decision against her executors, who were the only persons having a right to be there as representing her claim, was final. But where the right is one which never was vested in the testator himself, a question arising between two persons, both of whom claim under the same testator, it by no means follows that the executor represents either of them. What I submit is that a decision against executors binds all persons claiming under the testator only where the right is a right of the testator.

[FRY, L.J. :—If executors propound a will for probate, can you say that the decision binds them and no one else?]

That is a case of judgment *in rem*, which binds all the world. *Spencer* v. *Williams* (2), referred to by Mr. *Fischer*, shews the distinction for which I am contending—it was a case of dispute between different persons claiming under the same person. Here we are obliged to admit that there is a good will, to this extent,

(1) 4 Bro. P. C. 708. (2) Law Rep. 2 P. & M. 230.

that there is a valid appointment of executors who are entitled to take possession of all the testator's property in *England*, but they must distribute it according to the law of the domicil. In *Cooper* v. *Cooper* (1), which raised a question of election, it was held that the next of kin claiming under an intestacy were in the same position as residuary legatees claiming under a will. If this be borne in mind, the decision in *Spencer* v. *Williams* (2) is an express decision in our favour. *W. H. Spencer* claimed to be one of the next of kin of the intestate, and in proceedings in Chancery, to which *Williams* and the administratrix of *Spencer* were parties, there was a decision that *Spencer* was one of the next of kin, and that *Williams* was not. It was held that there was no estoppel as between *Williams* and the children of *Spencer*. There is an evident mistake in the report, Lord *Penzance* cannot have meant to say that the children did not claim through their father.

[FRY, L.J.:—Did not the case turn on the ground stated by Lord *Mansfield* in *Bouchier* v. *Taylor* (3), that the right to a grant of administration is not transmissible?]

That is an *obiter dictum* which has not been followed. The rule is quite established in the Court of Probate, that, with hardly any exception, the right to a grant of administration follows the right to the property, and it will be refused to a next of kin who has parted with his interest: *Young* v. *Peirce* (4). The Courts have considered that the object of the statutes of administration, 31 Edw. 3, c. 11, and 21 Hen. 8, c. 5, is to give the management of the property to the person who has the beneficial interest in it, and to effectuate this object they have done some violence to the words of the statutes: *Williams* on Executors (5). *Spencer* v. *Williams* is an authority in support of my contention, that legal personal representatives represent the estate only in respect of rights or liabilities vested in the testator or intestate.

[BAGGALLAY, L.J.:—Suppose the Court of Probate had found the domicil Chilian, and the will executed as required by Chilian law, in which case probate would still have been granted, what would have been the duty of the executors as to the three-fourths

(1) Law Rep. 7 H. L. 53.
(2) Ibid. 2 P. & M. 230.
(3) 4 Bro. P. C. 708.
(4) 1 Freem. 496.
(5) 6th Ed. Part 1, bk. v. ch. ii. sect. 1, p. 421.

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of the estate remaining after payment of debts, of which three-fourths, according to Chilian law, the testator could not dispose. Would it be their duty to see them paid to the right parties?]

I think it would.

[FRY, L.J.:—Or ought they to pay them over to the Chilian representative?]

If there was no litigation here, I apprehend they might safely pay them to the Chilian representative; but if a litigation had been commenced here the whole English estate must have been administered here: *Enohin* v. *Wylie* (1); *Ewing* v. *Orr Ewing* (2).

[FRY, L.J.:—Is not a large part of your claim a claim which did exist against the testator himself?]

I have three claims: a claim to specific bonds as part of the matrimonial partnership property, a claim to the rest of the partnership property, and a claim to a share of the testator's personal estate at his death, which remains after satisfying my other claims. The last is the only claim with which domicil has anything to do, so the others may be left out of consideration. As to *Bouchier* v. *Taylor* (3), it is not to be concluded that the House of Lords adopted all the views which were urged upon them, and Mr. *Hargrave* does not say that they did. Part of the argument was (4), "Executors are ranked by the civilians amongst the *legitimi contradictores*, that is, persons who, having the primary and principal right, may prosecute or defend suits so as to conclude others whose rights are of the secondary and dependent kind; which is the reason for allowing such third persons to intervene," and Mr. *Hargrave* then refers to *Erici Mauritii Dissertatio de jure interventionis*, sect. 15, "*Suâ naturâ ac propriâ vi nocet vel prodest sententia aliis quam inter quos lata est, quoties lis tractatur cum legitimo contradictore, à quo cæteri jus suum tanquam à fonte derivant ac recognoscunt.*" He then cites a passage from the same section giving as an instance a decision between the *hæres scriptus* and the *hæres legitimus*, a decision between whom binds the legatees, "*totum enim legatorum jus dependet ab institutione hæredis unde vires capit testamentum.*" The concluding

(1) 10 H. L. C. 1.
(2) 9 App. Cas. 34.
(3) 4 Bro. P. C. 708.
(4) Hargrave's Law Tracts, pp. 475, 476.

passage of the quotation shews clearly the limitations of the rule, "*cui quidem quæstioni hodie locus tantum forat, si ex alio capite quam injustâ præteritione vel exhæredatione liberorum vel parentum testamenti jus impugnatur, his enim casibus, annullatâ institutione, cætera servantur.*" The same rule as to the necessity of the institution of an heir is laid down in *Mackeldeii Systema Juris Romani* (1). In our law this reason does not apply, for the rights of legatees do not with us depend on the appointment of an executor. With the Romans the *hæres scriptus* was the *fons*. With us the testator is the *fons*. With us the executor is *legitimus contradictor* in all contests with outsiders, but not for the purposes of internal administration. Where there was a contest between parties claiming under the testator, the Court of Chancery required the presence of both.

The next question is of still greater importance. I submit that it is not the law of this country that a finding of a Court of special jurisdiction on a question of fact, however necessary for the determination of a question within the jurisdiction of that Court, is conclusive in another proceeding before another Court in respect of a matter as to which the first Court had no jurisdiction at all. I contend that it is not even evidence. Now, first look at the judgment of the Probate Court as a judgment *in rem*. The proposition on the other side is that a judgment *in rem* is conclusive not only for the direct purpose of the decision *in rem*, as determining the right to property, or the *status* of a person, but also is conclusive evidence of every finding of fact that was a *sine quâ non* of the judgment, at all events if it appears on the face of the judgment that it was so. Now to test this by an instance. A tenant in fee dies a bachelor, leaving a father and brother, before the alteration of the law of inheritance. The father is sole next of kin, the brother heir-at-law. A stranger propounds a will making him universal legatee and devisee. The father enters a *caveat*, and disputes the will on the ground that the testator is not of sound mind. Issue is joined, and the judgment is entered on the record that the testator was of sound mind, and that probate therefore ought to be granted. Is the brother estopped from bringing ejectment? It is strange if he is, especially remem-

(1) Lips. 1847; lib. iv. tit. 3.

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bering that the Courts of law have never admitted probate even as *primâ facie* evidence of death. Take another instance. A tenant in tail in possession, with remainder to persons who are not his next of kin, makes a will of personal estate, and shortly afterwards executes a disentailing deed to a purchaser. He then dies without issue. Probate is opposed on the ground that the testator was not of age. The case is fought out between the executor and the next of kin, and the will is admitted to probate with a finding that the testator was of age. Is that conclusive as to the age between the purchaser and the remainderman? If so the remainderman may lose an estate of £10,000 a year, in consequence of a decision as to a small personal estate in proceedings of which he perhaps knew nothing, and in which, if he did know of them, he could not intervene. Now do the cases support any such rule? It has been applied in a class of cases which I submit are an anomaly, viz., cases in which the sentence of a foreign prize Court has been held conclusive, not only as to the fact that the ship was properly condemned, but as to the ground of that condemnation, viz., that she was an enemy's ship. *Hughes* v. *Cornelius* (1) is commonly referred to as the first of these cases; but, in fact, nothing there was in issue except the property in the ship; it merely decided that nobody could go behind the actual judgment *in rem*. The rule was introduced by later cases, of which I will first mention *Lothian* v. *Henderson* (2) in the House of Lords. The Judges gave their opinion that it was settled law that on matters of prize the judgment could be looked to to see whether it went on the ground that the ship was enemy's property, and that if it did, that was conclusive evidence in an action on a policy between the assured and the underwriters. They evidently came to this conclusion unwillingly, and they do not rest it on any such general principle as is now contended for, but on a series of decisions relating to this particular class of cases. Lord *Eldon* (3) appears to have been unable to account for the state of the law on this point. *Kindersley* v. *Chase* there referred to is reported in *Park* on Marine Insurance (4), and only lays down the proposition as settled by decision, that a condemnation on the

(1) 2 Show. 232; Sir T. Raym. 473.
(2) 3 B. & P. 499.
(3) 3 B. & P. 544.
(4) 8th Ed. p. 743.

express ground that a ship is enemy's property is conclusive as to that fact, but without referring it to any principle. *Pollard* v. *Bell* (1), there mentioned, is to the same effect. In *Christie* v. *Secretan* (2) the Judges treated the law on this subject as exceptional, and refused to extend it beyond what had been already decided. In *Fisher* v. *Ogle* (3) Lord *Ellenborough* speaks of the rule as "an overstrained comity," meaning, as I apprehend, that it was giving to the decisions of French Courts an effect which would not be given to those of our own Courts. In *Donaldson* v. *Thompson* (4) Lord *Ellenborough* expressed a strong opinion that the decisions on this head were wrong, and were not to be extended, and he states Lord *Thurlow* to have been of the same opinion. *Dalgleish* v. *Hodgson* (5) is of the same class, and carries the point no further; nothing is laid down applicable generally to judgments *in rem*. The last case to which I shall refer on this branch is *Hobbs* v. *Henning* (6). The judgment was delivered by Chief Justice *Erle*. He says (7), "The rule making the finding of a Judge upon any matter of fact upon which he professes to form his judgment, conclusive upon all the world, has been supposed to be anomalous, and to produce pernicious results: see Lord *Eldon's* opinion in *Lothian* v. *Henderson* (8) to that effect. Also in *Geyer* v. *Aguilar* (9) Lord *Kenyon* speaks of the rule as a source of the grossest injustice. So in *Fisher* v. *Ogle* Lord *Ellenborough*, speaking of the rule, says, 'the doctrine rests on a case in *Shower* which does not fully support it; and the practice of receiving these sentences often leads in its consequences to the grossest injustice.'" Then Chief Justice *Erle* says (10) that the principle on which such findings have been admitted in evidence is not clear, and cites with approval part of the judgment of Vice-Chancellor *Knight Bruce* in *Barrs* v. *Jackson* (11), and that part of the judgment of the Vice-Chancellor was not affected by the reversal of his decision. Chief Justice *Erle* then goes on to say, "The admissibility of the judgments of prize Courts upon matters

(1) 8 T. R. 434.
(2) Ibid. 192.
(3) 1 Camp. 418.
(4) Ibid. 429.
(5) 7 Bing. 495.
(6) 17 C. B. (N.S.) 791.
(7) Ibid. 823.
(8) 3 B. & P. 499.
(9) 7 T. R. 681, 695.
(10) 17 C. B. (N.S.) 826.
(11) 1 Y. & C. Ch. 585.

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of fact, is not restricted within these limits; and, although we are bound here to hold that they are admissible so far as the decided cases have established their admissibility, yet beyond that limit we would not go: and we consider that the attempt to use the judgment as an estoppel does trangress that limit, there being no precedent for it." We have, therefore, a series of expressions of opinion by Judges of the highest eminence, Lord *Eldon*, Lord *Kenyon*, Lord *Ellenborough*, Lord *Thurlow*, and Chief Justice *Erle*, that the rule was one peculiar to decisions of prize Courts, and not capable of being supported on principle. In *Castrique* v. *Imrie* (1) Mr. Justice *Blackburn*, delivering the opinion of himself and four other Judges, says (2): "A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible, evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged. But very early in insurance cases a practice began, of treating the judgment of a prize Court condemning a vessel as being the property of an enemy, as not only conclusive evidence that the vessel was condemned, which of course it was, but also as conclusive evidence that the vessel was not neutral." This treats the general rule as being what I contend for, and the prize cases as an anomaly.

[BOWEN, L.J., referred to *Scott* v. *Shearman* (3) as to the effect of condemnation of goods in the Exchequer, and the observations of Lord *Kenyon* on that subject in *Geyer* v. *Aguilar* (4).]

There is nothing there to shew that Lord *Kenyon* considered the Exchequer decisions analogous to prize cases as regards collateral facts. *Attorney-General* v. *King* (5) has been referred to, but really does not bear on the point when the judgment is examined. *Hart* v. *M'Namara* (6) appears to have some bearing, but it is a report *ex relatione*, and cannot be relied on. Against

(1) Law Rep. 4 H. L. 414.
(2) Ibid. 434.
(3) 2 W. Bl. 977.
(4) 7 T. R. 696.
(5) 5 Price, 195.
(6) 4 Ibid. 154, n.

this may be set *Bailey* v. *Harris* (1). The result of an examination of the authorities is that there is no case except *Hart* v. *M'Namara* (2) in which the record of condemnation has been admitted in evidence against a person not a party to the condemnation, for any purpose except that of title to the goods. Then as to the cases on settlement of paupers. In *Reg.* v. *Inhabitants of Hartington* (3) it is said (4) that orders of removal unappealed against or confirmed on appeal are conclusive evidence, not merely of the fact directly decided, but of those facts which are mentioned in them and are necessary steps to the decision, but the Court did not say that this was so in cases other than settlement cases. The present Lord Chancellor, in *Reg.* v. *Hutchings* (5), expressed strong doubts as to the correctness of that decision; but without questioning whether these cases are law or not, I say they form another class of exceptions. The danger of allowing decisions as to settlement to be evidence of the facts on which they were founded, is pointed out by the Judges in *Duchess of Kingston's Case* (6). In *Rex* v. *Inhabitants of Rudgeley* (7) the rule is spoken of with regard to settlement cases, and in terms which do not shew that the Judges considered it founded on any general principle.

[BOWEN, L.J., referred to the cases in *Taylor* on Evidence (8).]

In none of those cases is there any trace of making use of the decisions against persons not parties to the proceedings. They are, in fact, cases between the Crown and the receiving parish. To make the law on this subject applicable to the present case, an instance should be produced of a removal order being put in evidence in a trial of the right to property. These cases, then, do not support the proposition that a judgment *in rem* makes the findings of fact on which it proceeds binding on all the world. The *Code Napoléon*, which gives the law to a large part of *Europe*, is in accordance with my contention: *Code Civil*, s. 1350.

There is another point which is only material if the Court

(1) 12 Q. B. 905.
(2) 4 Price, 154, n.
(3) 4 E. & B. 780.
(4) Ibid. 797.
(5) 6 Q. B. D. 300.
(6) Sm. L. C. 8th Ed. pp. vol. ii. 792–3.
(7) 8 T. R. 620.
(8) 8th Ed. p. 1434 *et seq.*

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holds that the judgment of the Probate Court is to be treated as a judgment between *Adelinda* and the residuary legatee. I say that, even in that case, the judgment is not binding on the question of domicil, in a suit for distribution. Observe the form of the decree: it does not state the domicil as the ground of the judgment, but admits the will to probate and then decides the question of domicil separately.

[FRY, L.J.:—When you look at the decree in connection with the pleadings, can you say that the decision as to domicil is not the ground of the decree?]

[*Rigby* then referred to the proctor's affidavit which has been already mentioned. This affidavit, besides stating the deponent's belief that the shorthand notes were correct, gave extracts from the judgment, and the evidence adduced, and among other evidence to shew that the will was good according to the law of *Chili*. The Court ultimately determined that it should be read *de bene esse*.]

That shews that the English domicil was not necessary to the conclusion that the will must be proved, as the same result would have followed if the domicil had been Chilian. My proposition is, that where a Court has exclusive jurisdiction as to one matter, and another Court has exclusive jurisdiction as to another matter, the second Court, in dealing with matters as to which the first Court had no jurisdiction, cannot pay any regard to the grounds of the judgment of that Court. Suppose a tenant in fee died leaving a son his heir and sole next of kin, and that then a will giving the real and personal estate to another person was propounded for probate, which the son as next of kin unsuccessfully opposed, the judgment of the Court of Probate would not bind the son in an action of ejectment between him and the devisee as to the real estate, because the Court of Probate has no jurisdiction as to real estate. As regards real estate, Courts of law have paid no attention to proceedings in the Probate Court. A probate was not even secondary evidence of a lost will until the statute 20 & 21 Vict. c. 77, s. 64: *Doe* v. *Calvert* (1). If there had been any rule that a judgment of the Probate Court

(1) 2 Camp. 389.

should be binding in the way now proposed, we should have had some trace of it in the books. It is said, indeed, that *Barrs* v. *Jackson* (1) establishes it. But the *ratio decidendi* in that case was that the decision in the Probate Court as to who was next of kin, if not appealed from, would have been conclusive in a suit for distribution in that Court, and if so, ought to be treated as conclusive in the Court of Chancery, as laid down by Lord *Hardwicke* in *Thomas* v. *Ketteriche* (2). The judgment of Lord *Lyndhurst*, therefore, turns entirely on the fact that the Court of Probate then had a concurrent jurisdiction to administer the estate, a point to which the attention of the Vice-Chancellor does not appear to have been directed. The principles laid down in the judgment of the Vice-Chancellor were approved in *Reg.* v. *Hutchings* (3), *Nelson* v. *Couch* (4), and *Hobbs* v. *Henning* (5). It is clear, then, that but for the concurrent jurisdiction, the decision in *Barrs* v. *Jackson* would have been the other way. At the time of the trial in the Court of Probate that Court had no concurrent jurisdiction in the distribution of the estate: 20 & 21 Vict. c. 77, s. 23. In *Commissioners of Leith Harbour and Docks* v. *Inspector of the Poor* (6) Lord *Chelmsford* says, that to make a judgment operate as an estoppel it must be between the same parties and upon the same subject-matter coming directly in question either in the same Court or in another Court of co-ordinate jurisdiction. Even if the decree in the probate suit is admissible evidence, it is not conclusive, and the inquiry ought, therefore, to be directed.

BAGGALLAY, L.J.:—

I am requested, Mr. *Rigby*, by my colleagues, to express to you our thanks for the very able and exhaustive argument you have addressed to us, which throws much light on a very difficult subject. What we shall ultimately do with the case depends on what we shall hear in reply.

James Kaye, with them.

(1) 1 Y. & C. Ch. 585: 1 Ph. 582.
(2) 1 Ves. Sen. 333.
(3) 6 Q. B. D. 300.
(4) 15 C. B. (N.S.) 99.
(5) 17 Ibid. 791.
(6) Law Rep. 1 H. L., Sc. 17.

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Hemming, in reply:—

Mr. *Rigby's* first proposition comes in fact to this, that a judgment whether *in rem* or *inter partes* is binding, if *in rem* on everybody, and if *inter partes* on the parties and those claiming under them, so far only as regards the conclusions come to, and that every intermediate step, even the verdict on which the judgment is founded, is to be treated as something incidental or collateral, and does not create an estoppel. That is the essence of his contention on that point, though he did not put it in terms so widely as that, because *Outram* v. *Morewood* (1) settled it to be law that a verdict between *A.* and *B.* followed by judgment is an estoppel as to the facts, as much as the final judgment itself is an estoppel as to the right determined. In the latter case it is necessary that the purpose and object of the two suits should be the same, but in the case of estoppel by a finding of fact, it is of no consequence that the two suits are for entirely different purposes. This distinction explains the language of Lord *Westbury* in *Hunter* v. *Stewart* (2). In *Outram* v. *Morewood* the first action was for a trespass on part of *Cowclose*. The plaintiff alleged himself owner of the whole of *Cowclose*. The defendant set up a title to the whole of the close, which was more than he needed to do, since the only question was as to the title to the part; a verdict followed by judgment was found against the defendant. In a subsequent action for a trespass on another part of *Cowclose* the verdict in the first action was held conclusive as negativing the defendant's title to every part of *Cowclose*. The pleadings in the first action raised the question as to the whole of *Cowclose*, and though a finding as to the whole would not otherwise have been necessary for the purposes of the action, the defendant was held concluded. But where the judgment is *in rem* is it possible to hold that the judgment is binding on all the world, but that the findings on which it proceeds are binding only *inter partes*?

[BOWEN, L.J.:—It seems to me that there would be good sense in so holding.

FRY, L.J.:—It is for the convenience of mankind that judgments

(1) 3 East, 346. (2) 4 D. F. & J. 168.

in rem should be binding on all the world; but it does not seem to me to be for the convenience of mankind that everybody should be bound by all the findings of fact on which they are founded.]

It would be very inconvenient that there should be binding judgments implying of necessity one state of things, and other binding judgments implying of necessity the opposite state of things. This would be especially so in questions of domicil, which is as much a matter of *status* as any of those matters which form the subjects of decisions *in rem*, the only distinction being that there is no proceeding the ultimate purpose of which is to declare the domicil. There are four classes of judgments *in rem* in which the findings have been treated as conclusive—prize cases, settlement cases, revenue cases, and cases in the Ecclesiastical Court. Mr. *Rigby* gets rid of these by treating them as anomalous. He seeks to explain away the authorities we rely on; but he cites no case in which a finding on which a judgment *in rem* was based has been held not to be equally conclusive on all the world. It would be remarkable if every case on the point in the books was anomalous. Now, as to cases of prize, it has been repeatedly held that the decision of a foreign prize Court was binding on all the world as to the nationality of a ship condemned, and no one before Mr. *Rigby* ever asserted that we are to pay more respect to the decisions of foreign tribunals than to those of our own Courts.

[BOWEN, L.J.:—In *Castrique* v. *Imrie* (1) *Blackburn*, J., appears to treat the prize cases as exceptional.]

Every class of cases, in which the rule that a party is not bound by a *res inter alios acta* is set aside, that is, every case of a judgment *in rem* must be treated as in some sense exceptional, but the prize cases are not exceptions from the general rules applicable to judgments *in rem*. Then in pauper removal cases it is admitted that it has been the course to treat a decision as to the settlement of a pauper as conclusive on the findings of facts on which it is based.

[BOWEN, L.J.:—Can you give a case where a finding in a

(1) Law Rep. 4 H. L. 434.

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removal case has been held binding in any other case not being a removal case?]

The point would very seldom arise, and I cannot give any instance; but such a finding has been held binding on other parishes, and in respect of other paupers. In *Reg.* v. *Inhabitants of Evenwood* (1) the second contest was not between the same parishes as the first, and the finding in the first was held binding.

[FRY, L.J.:—That is merely treating the judgment *in rem* as binding on all the world.]

Then as to the revenue cases, they lay down in broad terms the proposition that the judgment and the findings on which it proceeded are binding on all the world.

[BOWEN, L.J.:—Have you any case except *Hart* v. *M'Namara* (2), to which Mr. *Rigby* referred, in which the record of condemnation has been admitted against strangers?]

What I say is that there are classes of cases relating to ships, removal of paupers, and Exchequer condemnations, in which it has been held that the finding on which the judgment proceeds is binding to the same extent as the judgment itself, and there must be a general principle on which those cases proceed. The rule is laid down broadly in *Reg.* v. *Inhabitants of Hartington* (3), a removal case.

The case of *Rex* v. *Inhabitants of Wick St. Lawrence* (4) to some extent supports my view. *Rex* v. *Inhabitants of Rudgeley* (5) lays down the rule clearly.

[FRY, L.J.:—The word "conclusive" is used, but was anything more meant than that the finding was evidence, and as no counter-evidence was produced was therefore conclusive?]

The Judges do not appear so to put it. In *Rex* v. *Inhabitants of Silchester* (6) the finding of facts on which a father's settlement was decided was held to conclude that of his children.

[FRY, L.J.:—Their settlement surely followed from the judgment as to the settlement of the father?]

(1) 3 Q. B. 370.
(2) 4 Price, 154, n.
(3) 4 E. & B. 780, 794.
(4) 5 B. & Ad. 526.
(5) 8 T. R. 620.
(6) Burrow's Settlement Cases, p. 551.

It followed from the facts found on the former occasion, not from the order alone.

Throughout the cases the Judges treat the findings of fact on which a judgment is based as binding, and exclude only findings as to incidental and collateral matters. The case of *Kindersley* v. *Chase* (1) is important. The rule is there laid down by Sir *William Grant*, delivering the judgment of the Privy Council, in the most distinct terms, that a condemnation by a prize Court, when it proceeds on the ground that the property belongs to enemies, is conclusive that the property does belong to an enemy, not only for the immediate purpose of the sentence, but is binding on all Courts and as against all persons.

[FRY, L.J.:—Sir *W. Grant's* judgment does not shew whether the rule in cases as to prize is exceptional or whether it illustrates a larger principle.]

There is no hint in the judgment that these cases do not rest on a general principle, and till the contrary is shewn, it is to be assumed that a series of decisions rests on a general principle, which in the present case must be, that the findings on which a judgment *in rem* proceeds are binding on all the world.

[BOWEN, L.J.:—*Park* appears to rest the cases on this, that a practice had grown up, which it was too late to disturb, because people had framed their contracts of insurance on the faith of it.]

That is only the observation which is often made where a doctrine has been settled by a series of decisions—that it is too late to consider whether they are right or wrong—he does not intimate any opinion that they are wrong.

[BOWEN, L.J.:—Is not the language of *Blackburn*, J., in *Castrique* v. *Imrie* (2) directly against you?]

I think not, if rightly construed. Mr. Justice *Blackburn* does not appear there to be drawing a distinction between judgments *in rem* and other judgments, but between findings on which the judgment is based and findings on mere collateral points; but, if this be not so, his opinion is only a *dictum*, and must be read in connection with the *dicta* the other way.

The other side rely on the observations in the two cases,

(1) Park on Marine Insurance, 8th Ed. p. 743. (2) Law Rep. 4 H. L. 434.

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Lothian v. *Henderson* (1) and *Castrique* v. *Imrie* (2). In *Lothian* v. *Henderson* the doubt expressed by Lord *Eldon* is not whether the grounds of the judgment as well as the judgment were conclusive, but whether the sentences of the French Prize Courts ought to have been admitted at all as binding judgments *in rem*. In *Castrique* v. *Imrie* the question did not arise whether the judgment of the French Court was conclusive as to its grounds, the decision being only that *Castrique* could not go behind the judgment, and say that the condemnation was wrong, and the sale under it invalid. The Judges therefore who advised the House of Lords were not called upon for any opinion on the questions now in dispute, the contention in that case being that the judgment could not be treated as binding when the French Court had proceeded on a misunderstanding of the law of *England*. The discussion as to the extent to which judgments were binding was brought in only incidentally, and there is nothing to shew that the present point was before the minds of the Judges. What they were thinking of was whether a foreign judgment could be deprived of its ordinary effect by reason of a mistake in English law, and no distinction in this respect is drawn between judgments *in rem* and judgments *inter partes*. Lord *Blackburn* seems to speak as if Lord *Eldon* used the word "collateral" in *Lothian* v. *Henderson* as referring to the grounds of the judgment, but that can scarcely be what Lord *Blackburn* intended, for he is only putting in other words what he conceives Lord *Eldon* to have said, and a reference to Lord *Eldon's* language, shews what was really meant both by him and, I think, by Lord *Blackburn*, and that it does not touch the point now under discussion.

[BOWEN, L.J.:—Suppose there are two grounds on which condemnation might be decreed, and the Court decrees it on both, are both findings conclusive?]

I am not aware of any decision on the point, but I submit that they are. The same question might arise on a judgment *inter partes*, and it would be most unreasonable that a party who has two grounds should lose all the benefit of estoppel because the Court decides in his favour on both.

(1) 3 B. & P. 499. (2) Law Rep. 4 H. L. 434.

Then as to probate actions, Mr. *Rigby* contends that, because the Court of Probate no longer has jurisdiction in distribution, *Barrs* v. *Jackson* (1) and the cases of that class are no longer law. That argument is met by *In re Ivory* (2). The observations of Lord *Cairns* are in favour of the judgment of *Lush*, J., though, as the case did not come before the Court of Appeal on the merits, they were not called on to decide it.

[FRY, L.J.:—Is there any case in which, under an inquiry who are next of kin, letters of administration have been admitted as evidence?

BAGGALLAY, L.J.:—The question there only was whether the Court should appoint a receiver against a *de facto* administrator, which would require a special case.]

The decision did not go on that consideration but on the ground of *Barrs* v. *Jackson*.

[Mr. *Rigby*:—It is of frequent occurrence that letters of administration are granted to the Crown and then an inquiry as to next of kin is granted.]

In those cases the Crown lets the inquiry go, and does not claim the benefit of estoppel. This course of concession by the Crown in practice cannot overrule *Barrs* v. *Jackson*.

Then, supposing this is not to be treated as a judgment *in rem*, how far does the representative character of the executor go? It is admitted that the executor represents the estate to a great extent, and I say that so long as the question is one which concerns the estate as a whole, and is not a contest as between beneficiaries, the executor represents it. The measure of the executor's representative character should be co-extensive with the purpose of it.

[FRY, L.J.:—It is conceded that in all cases in which the liability of the testator is concerned the executor represents the estate. How much further do you go?]

I say that what you have to look at is, whether the question is between one beneficiary and another, or a question the decision of which affects the whole estate in the hands of the executor. The executor represents all the beneficiaries where a claim is made

(1) 1 Ph. 582. (2) 10 Ch. D. 372.

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adversely to the estate. It is difficult to see any reason for Mr. *Rigby's* distinction that the claim must be one which has been made or could have been made against the testator himself.

[FRY, L.J.:—A creditor who obtains an administration decree proves his debt again in Chambers.]

Yes; because the Court is satisfied with *primâ facie* evidence of a debt to found an administration decree, as it would be very inconvenient to have a contest at the hearing to fix the amount of the plaintiff's debt. Moreover, the executor does not represent the creditors, and the other creditors ought to have the debt proved as against them: *Owens* v. *Dickenson* (1). The reason for giving executors a representative character is, that it would be very inconvenient for a claimant against an estate to have to litigate his claim with every one beneficially interested. The law, therefore, vests the property in the executor, who represents the testator for the purpose of all demands adverse to the will. Suppose a testator bequeaths a leasehold house. After his death a stranger comes and says that the house never was the testator's at all, or that his interest in it determined a year before his death. It is not disputed that the executor would represent all the persons interested under the will as regards that claim. Suppose, then, that instead of this, the claimant alleged that the testator had only a life interest in the leasehold, so that no claim could have been made against the testator himself, it would be very inconvenient to hold that the executor could not represent the estate in resisting this claim; and yet if Mr. *Rigby's* contention is right you must so hold. And this has never been so held.

[FRY, L.J.:—Suppose a residuary gift so worded that it is doubtful whether it includes the whole residue. Could the next of kin sue the executor alone, without bringing the residuary legatee before the Court?]

That is not analogous to the present case, since both parties claim under the testator, but I submit that a decision against the executor would bind the residuary legatee. Mr. *Rigby's* line is drawn for the purpose of keeping clear of *Bouchier* v. *Taylor* (2). I submit therefore that the decision of the Probate Court would,

(1) Cr. & Ph. 48, 56. (2) 4 Bro. P. C. 708.

if adverse, have bound the residuary legatee, that there therefore is mutuality, and that *Adelinda* is bound by the judgment.

But suppose the executors did not represent the residuary legatee. I say that as the conduct of the proceedings has been given to the residuary legatee he represents the estate for all purposes, and we are in the same position as if the executor was here claiming the benefit of the estoppel.

[FRY, L.J.:—The suit between *Adelinda* and the executor has been stayed by the order of 1877, but liberty is given to apply to the Court to add to the decree in *De Mora* v. *Concha* all accounts and inquiries necessary to determine the questions in that cause. Does not that mean that the questions which in that cause arose between *Adelinda* and the executor are to be litigated between *Adelinda* and the residuary legatee?]

No. The order was made for convenience, that a number of suits might not be going on, and it only intended to alter the machinery for deciding on the rights of the parties, not to alter those rights. The order cannot be held to give *Adelinda* a right to raise a question which she could not have raised in her original suit. The question to be tried must be whether, as between *Adelinda* and *Mannequin*, she is entitled. They are in substance trying to get an order in an administration suit in the absence of the executor. The order of the 23rd of February 1882, appoints the residuary legatee to represent the estate for all purposes, and provides that it shall not be necessary to give notice to the executor, because the residuary legatee was intended to stand in his place. It would be a most unjust result if, because the executor is not here, the residuary legatee is to be deprived of any defence which the executor could set up. If *Trinidad* does not stand in the place of the executor then no order ought to be made without having the executor here. It was only because the Vice-Chancellor considered that *Trinidad* stood in the executor's shoes that he made the order; and if this Court considers that there is no such representation, then it will refuse to make such an order as this in the absence of the executor.

[Mr. *Hemming* having declined to consent to the affidavit of the proctor, which had been read *de bene esse*, being treated as evidence,

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the Court held that it could not be entered as read, but said that they would consider as to the mode in which it should be referred to in the order, so that it might be used in the House of Lords if the House should hold it admissible.]

Feb. 21. The judgment of the Court (*Baggallay*, *Bowen*, and *Fry*, L.JJ.) was now delivered by

BOWEN, L.J., who, after stating the facts as above, proceeded as follows:—

It was contended on behalf of the Appellants that the decree of the Court of Probate dated the 28th of July, 1860, was conclusive as to the question of domicil.

The ordinary effect of a grant of probate has been described in the several judgments delivered in the House of Lords in the case of *Whicker* v. *Hume* (1). Probate of a will, says Lord *Chelmsford*, "conclusively establishes in all Courts that the will was executed according to the law of the country where the testator was domiciled." "The first question made," says Lord *Cranworth* (2), "is one that was extremely important, namely, the point, whether probate was or was not conclusive evidence of the domicil. Now, I have no hesitation in saying, that the affirmative of that proposition cannot be a correct exposition of the law. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else." . . . "Probate of a will in common form," Lord *Wensleydale* added (3), "is conclusive evidence of the title of the executors to all personal property of which the testator was capable of disposing; it is also conclusive evidence that it was executed in due form according to the law of the country where he was domiciled at the time of his death." But the Appellants contend that in the present case the grant of probate was made upon the ground of a finding in fact arrived at by the Court that the testator's domicil was English, a finding which they allege is recorded in the judgment itself; and they have asked us to adopt and to apply the suggested proposition that a judgment *in rem* of a Court of competent jurisdic-

(1) 7 H. L. C. 124, 143. (2) 7 H. L. C. 156.
(3) 7 H. L. C. 165.

tion decides conclusively against all the world, not merely the titles, rights, or dispositions of property which it necessarily determines, but also the question of fact upon which such adjudication has proceeded.

In support of this proposition, which has been the subject of much discussion both in this country and in *America*, and which would, perhaps, seem in theory to carry the conclusiveness of judgments *in rem* beyond those requirements which the repose of society and the security of private dealings demand, the Appellants rely, first, on the decisions as to the effect of sentences of prize Courts, which begin with *Hughes* v. *Cornelius* (1) and culminate in *Lothian* v. *Henderson* (2), and the history of which is given at length in *Park* on Marine Insurance (3). The effect of such decisions is stated by Lord *Ellenborough* in *Bolton* v. *Gladstone* (4) as follows: "It may now be assumed," says Lord *Ellenborough*, "as the settled doctrine of a Court of English law, that all sentences of foreign Courts of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of assurance, upon every subject immediately and properly within the jurisdiction of such foreign Courts, and upon which they have professed to decide judicially." (See the judgment of Mr. Justice *Blackburn* in *Castrique* v. *Imrie* (5).) Secondly, the Appellants further rely upon cases of condemnation of goods in the Exchequer, in which the record of condemnation has been said to have a conclusive force as to the ground on which the condemnation proceeded, so far, at all events, as all parties are concerned who have civil rights depending on the same question: see *Hart* v. *M'Namara* (6), and *per* Lord *Kenyon* in *Geyer* v. *Aguilar* (7). Lastly, we were referred by the Appellants to decisions and *dicta* as to the effect of orders of removal in settlement cases, of which *Reg.* v. *Inhabitants of Wye* (8) and *Reg.* v. *Inhabitants of Hartington* (9) are well-known examples.

Before determining in the present case the limits within which the general proposition presented by the Appellants is accurate, or

(1) 2 Show. 232.
(2) 3 B. & P. 499.
(3) Cap. 18.
(4) 5 East, 155, 160.
(5) Law Rep. 4 H. L. 434.
(6) 4 Price, 154, n.
(7) 7 T. R. 696.
(8) 7 A. & E. 761, 770.
(9) 4 E. & B. 780.

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should be extended beyond the range of exceptional classes of cases in which it seems to have been confined hitherto within certain limits, it is necessary to see how far the facts of the present case would admit in any event of its application, and to examine carefully the allegation upon which the suggestion that it ought to be applied rests—viz., that the finding of an English domicil was one upon which the judgment *in rem* of the Court of Probate in this case did actually proceed.

The deceased in the present instance had either a Chilian or an English domicil, and it is between these two alternative domicils that the choice has to be made. Now, it is admitted to be the law of *Chili* that the will of a domiciled Chilian dying in *England* would be valid in *Chili* if executed in conformity with English law. The Court of Probate therefore was not in any way obliged, in order to arrive at its judgment *in rem*, to adjudicate between the two domicils. If probate ought to have equally been granted on the hypothesis of domicil *A.* or domicil *B.*, it is not necessarily within the scope of probate proceedings to decide the question of domicil at all. The Respondent, indeed, tendered in evidence before us shorthand notes of the trial in the Probate Court, which professed to shew that the Judge of the Probate Court had considered the grant of probate necessary whichever domicil was to be preferred; but we did not consider these shorthand notes sufficiently authenticated for reliance to be placed upon their accuracy, as they were only vouched for by the affidavit of the proctor, who professed to verify them according to his own memory of what had taken place, after a lapse of twenty-four years. The Appellants, upon the other hand, rely on the pleadings in the case, which unquestionably raise an issue as to the two domicils, and next on the wording of the decree itself, which, after pronouncing in favour of the validity of the will, proceeds further to decide in favour of an English domicil. It is worded in a very unusual form, and upon a careful consideration of it we are by no means satisfied that the finding of an English domicil is intended to be set forth as the real ground upon which the grant of probate proceeded. The Judge first pronounces for the force and validity of the will, then declares that the deceased was a domiciled Englishman, and finally decrees probate, which is not a usual method of decreeing probate. We are of opinion that the probable explana-

tion of the uncommon form of the decree is, that that finding as to an English domicil was inserted at the special request of the parties, with the view of registering the decision of the Court on a point that had been litigated between them longer than was necessary for the decision of the case, and not as being the real foundation of the judgment *in rem*. If so, this part of the decree can at most have the force of a judgment *inter partes*, and it would be hazardous in the extreme, on such materials, to treat it as the basis of the grant of probate itself. This solution appears to us preferable to the view that the Court of Probate unnecessarily intended to decide, as the foundation of a judgment *in rem*, a matter the determination of which was not required by the scope of the proceedings, and thus to give to the grant a conclusive force on the question of domicil altogether beyond that which would in ordinary cases attach to such grant. Whatever be the exact limits of the rule as the effect of judgments *in rem*, we think accordingly that the adjudication as to domicil does not and cannot conclude any but the parties to the suit, their privies, and those whose interests they represented, to the extent to which they lawfully did represent such interests in such a suit.

The Appellants next contended that the finding of an English domicil must at least be treated as *res judicata inter partes*, and as such binding mutually between *Adelinda* and the residuary legatee. It was in reality a finding between *Adelinda* and the executors of the will, and this leads us to consider the question how far the executors in a case like the present represented, with respect to such finding, a residuary legatee. It is manifest that for many purposes the executors do represent such a legatee. But *Adelinda* and her husband are not seeking to impeach the title of the executors, the validity of the will, or the interest of the legatee under the will. Their contention is that by the law of *Chili* the testator could only dispose, in favour of a residuary legatee, of a portion of his property, and that the residue remained outside the testator's power of testamentary disposition, an instance which has here occurred in actual litigation of the imaginary case supposed by Lord *Cranworth* in *Whicker* v. *Hume* (1). We are of opinion that, as to such a claim, executors would not in

(1) 7 H. L. C. 124, 156.

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a probate suit be the representatives of the residuary legatee, to bind such legatee by any issue which might be raised incidentally on a question of domicil, nor *legitimi contradictores* on his behalf in such a suit on such a point, within the meaning of the civil law or the law of this country. The scope of the probate suit is to establish that the will was executed in conformity with the law of the country of domicil, wherever that country was. But if it is not necessary for the purpose of such a suit to establish an English domicil more than a Chilian, the executors could not, either by litigating an incidental question, or by admissions they might choose to make about it, conclude the residuary legatee as to the extent to which the testator's will when proved will operate on property alleged by an adverse claimant to be outside his power of testamentary disposition. And as the residuary legatee could not be bound under such circumstances by a decision against the executors as to domicil, he cannot, since estoppels are mutual, treat as binding a decision in their favour. On this ground accordingly the Appellants also fail.

The third and last contention of the Appellants—that the Respondent is barred by lapse of time from now asking for the inquiry which has been ordered—seems to us plainly untenable. The history of the proceedings appears conclusively to shew that there has been on the part of the Respondent no such acquiescence as bars her from now reventilating the question of domicil. The inquiry which has been the subject of discussion was, by the order of July 20, 1878, ordered to stand over till the question of the testator's marriage was determined, and this question was only determined on the 7th of May, 1884. The appeal therefore must, in our opinion, be dismissed, with costs.

FRY, L.J. :—

There is one observation which it appears to Lord Justice *Baggallay* and myself may be made in corroboration of the conclusion expressed in the judgment just read by Lord Justice *Bowen,* in which we concur.

To ascertain whether *Adelinda* is bound by the decree in the Probate Court as a judgment between her and the executors of *Juan José Concha* as representing his residuary legatee, we must consider the exact nature of the claim made by her in the suit

begun by her in 1862, as stated in her bill of complaint in that cause. In that bill she alleges the fact of the probate in this country of her father's will, but she alleges that three-fourths of his personal estate, subject to their due proportion of debts and liabilities, devolved on her on her father's death. She does not dispute that by the English law the whole personal estate in *England* had passed to the executors, nor that the executors were the proper persons to ascertain and the hands to pay the debts of the testator; on the contrary, in her bill of complaint she states the administration decree pronounced by the Court of Chancery in the suit by the executors, and alleges that she is entitled to three-fourths of the personal estate of her father, which, after payment of his debts and funeral and testamentary expenses, may remain for distribution in the administration suit, and she prays relief accordingly. In effect, therefore, she claims that the executors are trustees for her of three-fourths of the net residue of the personal estate. She is, therefore, claiming against the will so far as it may have purported to operate on the whole personal estate, but she is claiming under the will so far as it appointed executors; she is claiming against the residuary legatee, but she is claiming under the executors; and where two litigants both claim under a third person it seems that such third person can never be a *legitimus contradictor* on behalf of one of them against the other of them. We conceive it to be plain that if a man appointed an executor, and after his death a question arose between the residuary legatee of such testator and his next-of-kin as to whether there was an intestacy (entire or partial), the executor would no more represent the residuary legatee than the next of kin, because each of these two litigants would assert that the executor held the property in dispute for his benefit. And such appears to us to be the present case. *Adelinda Concha* and *Trinidad Concha* each assert that the executors hold for her or him the three-fourths of the net residue of the testator now in question, and the executors are therefore not *legitimi contradictores* for one of them against the other.

Solicitors for Appellants: *Ward, Mills, Witham, & Lambert.*
Solicitor for Respondent: *Worthington Evans.*

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C. A.
1885
Feb. 23.

In re VAVASOUR (A LUNATIC).

Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), s. 118 [*Revised Ed. Statutes, vol xi. p.* 685]—*Charge of Expenses of Improvements.*

A lunatic was tenant for life of the *H.* estate, and tenant in tail in possession of the *D.* estate. Expenses were incurred by the committee in improvements on both estates, but chiefly on the former:—

Held, that there was no jurisdiction to charge the *D.* estate with the expenses incurred on the *H.* estate.

THE lunatic was tenant for life of the *Hazlewood* estate, and tenant in tail in possession of the *Draycott* estate. The committee of the estate, in 1883, relet a farm forming part of the *Hazlewood* estate, and in order to secure a tenant, executed certain repairs and alterations at the expense of £201 4*s.* 9*d.* In the same year the committee relet a farm forming part of the *Draycott* estate, and bought from the old tenant certain fixtures for £16 17*s.* He also in the same year paid £27 16*s.* for repairs to buildings on the *Hazlewood* estate. The Master certified that it was proper that the committee should be reimbursed, and approved of a proposal that these sums, making together £245 17*s.* 9*d.*, should be raised out of the funds in Court. This was opposed by the next of kin, and minutes of order were prepared directing the sum with interest to be a charge upon and raisable out of the estate. Upon these minutes being sent to Lord Justice *Baggallay*, his Lordship raised the question whether there was jurisdiction to make such an order. The Master referred to the 118th section of the *Lunacy Regulation Act*, 1853, and *In re Gist* (1). The matter came again before Lord Justice *Cotton* in private, and his Lordship doubted whether anything more could be done than to charge on the *Draycott* estate the £16 17*s.* which had been expended on that estate. The case was then put in the paper to be discussed in Court.

Chadwyck Healey, for the committee, contended that under the *Lunacy Regulation Act*, 1853, s. 118, the Court had jurisdiction to make an order charging the whole expenses on the *Draycott* estate.

(1) 5 Ch. D. 881.

Ingle Joyce appeared for the next of kin.

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COTTON, L.J.:—

I am of opinion that we have no jurisdiction to do what is asked. If both estates had been held under the same title, the order might have been made, but in my opinion the Act only empowers us to charge the lunatic's interest in land with expenses incurred in respect of that land. It therefore does not enable us to charge land, of which he is tenant in tail, with expenditure incurred on another estate of which he is only tenant for life. Nor does it enable us to charge with that expenditure the inheritance of the latter estate. The *Draycott* estate can only be charged with the sum expended upon it.

BOWEN and FRY, L.JJ., concurred.

Solicitors for Committee: *Gadsden & Treherne.*
Solicitors for next of kin: *Harting & Son.*

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HALL *v.* TRUMAN, HANBURY, & CO.

C. A.
1885
KAY, J.
Feb. 5.
C. A.
March 4, 5.

[1884 H. 17.]

Practice—Discovery of Documents—Sufficient Affidavit—Interrogatory.

After a defendant has made a sufficient affidavit of documents the plaintiff will not be allowed to administer to him a general roving interrogatory as to documents in his possession, the effect of which would be to compel the defendant to make a further affidavit as to documents.

There may possibly be cases in which, after a sufficient affidavit as to documents has been made, the Court will allow the plaintiff to deliver an interrogatory as to some specific document or documents, but whether this shall be allowed is a matter within the discretion of the Judge in each particular case, and, though his decision can be appealed from, the Court of Appeal will not readily reverse it.

Jones v. *Monte Video Gas Company* (1) explained.

APPEAL from the refusal of Mr. Justice *Kay* to order one of the Defendants to file a further affidavit in answer to an interrogatory delivered by the Plaintiff for his examination.

The action was brought by *Michael Hall* against Messrs. *Truman*,

(1) 5 Q. B. D. 556.

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Hanbury, Buxton, & Co, brewers (sued by the name of the firm). The Plaintiff alleged that in the month of June, 1880, he was induced by the Defendants to call in a sum of £7000, which he had invested upon a mortgage of an hotel, called the "*Chippenham Hotel*," the Defendants offering and representing to him that, if he would do so, they would procure for him as good a security as he then had for the £7000. On the 3rd of March, 1881, the £7000, together with another sum of £1000 belonging to the Plaintiff which the Defendants then had in their hands, was invested on the mortgage of a public-house called the "*Duke of Marlborough's Head*," which the Defendants represented to the Plaintiff to be a good and sufficient security for the £8000, and as good a security as the mortgage of the *Chippenham Hotel*, and the Plaintiff was induced by this representation to accept the security. The Plaintiff alleged that the Defendants employed Messrs. *Hanbury, Hutton, & Whitting*, their own solicitors, to carry out the mortgage transaction, and that he, relying on the agreement with the Defendants and on their representations, did not have any independent advice, and knew nothing, and made no inquiries himself, with respect to the value or sufficiency of the mortgage. He had recently discovered that the security was not at the date thereof, and never was, a sufficient security for the sum of £8000, or an equally eligible security with the former security on the *Chippenham Hotel*, and he alleged that the Defendants made the representations to him knowing them to be untrue, and without believing or having good cause to believe them to be true. The property forming the security for the £8000 had been sold, and had realized only £2960, and the mortgagor had become bankrupt. The Plaintiff claimed damages for the breach of the agreement to procure him as good a security as that which he had on the *Chippenham Hotel*; damages for the misrepresentations as to the sufficiency of the mortgage of the 3rd of March, 1881; and indemnity by the Defendants against the loss sustained by the Plaintiff on the realization of that security.

By their statement of defence, delivered on the 24th of April, 1884, the Defendants said that the £7000 was not called in by the Plaintiff, but was voluntarily paid off by the mortgagor, and that they did not offer or represent to the Plaintiff that, if he

would call in the £7000, they would procure him as good a security for it as he then had. They said that they placed the Plaintiff in communication with *T. J. Guilford*, the mortgagor of the *Duke of Marlborough's Head*; that the advance of £8000 was arranged between him and the Plaintiff, independently of the Defendants, and that the Plaintiff accepted the security independently of the Defendants and upon the result of his own inquiries and investigations, and without relying upon any representations or opinions of the Defendants in relation thereto, and the Defendants denied that they at any time represented to the Plaintiff as a fact that the mortgage was a sufficient security or an equally eligible investment with the previous security on the *Chippenham Hotel*. The Defendants also said that, on the agreement for the advance of the £8000 being entered into, it was arranged between the Plaintiff and *Guilford* that Messrs. *Hanbury, Hutton, & Whitting* should prepare the necessary deed, and *Guilford* instructed them accordingly, and they, in pursuance of those instructions, prepared the mortgage deed of the 3rd of March, 1881, on behalf of all parties, and fully explained to the Plaintiff the nature of the transaction, and the state of the title to the mortgaged property. The Defendants said that Messrs. *Hanbury, Hutton, & Whitting* were not employed by them to carry out the mortgage transaction, and the Defendants were not parties to the deed nor to the transaction, and Messrs. *Hanbury, Hutton, & Whitting* were not employed on their behalf in relation thereto.

The Defendants were required to make an affidavit of documents in their possession or power relating to the matters in question in the action, and on the 26th of May, 1884, an affidavit of documents was made by *C. A. Hanbury*, one of the partners in the Defendants' firm. No further affidavit was asked for by the Plaintiff, and it was admitted that no such application could succeed. The Plaintiff afterwards obtained an order giving him leave to deliver interrogatories for the examination of the Defendants. This order was a general one, not relating to any specific interrogatories. The Plaintiff delivered four interrogatories, the fourth of which was as follows:—

"Have or has not you, or some or one and which of you, in your

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possession or power, or in the possession or power of your or some or one of your agents or agent, and have or has not you or some or one and which of you had and when last in your possession or power, or in the possession or power of your or some or one of your agents or agent, books, papers, accounts, letters, or documents relating to the matters in question in the action, and not mentioned or referred to in your affidavit of documents, and particularly:

"(*a.*) Correspondence, or copies of correspondence between you, or some or one of you, and Messrs. *Hanbury, Hutton, & Whitting.*

"(*b.*) Correspondence, or copies of correspondence, between your managers, or one of them, and Messrs. *Hanbury, Hutton, & Whitting.*

"(*c.*) Correspondence, or copies of correspondence, between you, or some or one of you, or your solicitors or managers, or one of them, and the said *Thomas James Guilford.*

"(*d.*) Books, ledgers, or documents shewing the state of accounts between you and the Plaintiff, or between you and the said *Thomas James Guilford.*

"(*e.*) Correspondence, or copies of correspondence, between you, or some or one of you, or your solicitors or managers, or one of them, and the auctioneers, or one of them, and the auctioneers or agents upon the sale.

"(*f.*) Valuations, or instructions for valuations, or copies of valuations or instructions for valuations, of all or any part of the property included in the Plaintiff's security."

The interrogatories were on the 4th of December, 1884, answered by *C. A. Hanbury,* and he answered the 4th interrogatory as follows: "I have already made an affidavit of documents in this action on behalf of the Defendants, and I submit that, having made such affidavit, I ought not to be required to answer the 4th interrogatory. And I further say that since the date of my said affidavit, and to the best of my knowledge, information, and belief, no books, papers, accounts, letters, or documents relating to the matters in question in this action have come into the possession or power of myself or my co-Defendants, or any of them, or our solicitors or agents, save and except the copies of certain correspondence mentioned in the Plaintiff's affidavit of documents,

which have been furnished by the Plaintiff's solicitor to our solicitors, and save and except the papers in this action which have been prepared or delivered since the date of the said affidavit." The Plaintiff moved that *C. A. Hanbury* might be ordered to give a further and better answer to the 4th interrogatory. The motion was heard before Mr. Justice *Kay* on the 5th of February, 1885.

W. Pearson, Q.C., and *E. W. Byrne*, for the Plaintiff:—

The question is, have the Defendants made a sufficient answer to the interrogatory, and it is submitted that they have not; and that the Plaintiff is entitled to have the order made in Chambers reversed. It has been settled that there can be no cross-examination upon an affidavit of documents, but that in certain cases a further affidavit will be ordered; and that interrogatories may be administered. In *Jones* v. *Monte Video Gas Company* (1) Lord Justice *Cotton* said (2), "that if the party seeking production is dissatisfied with the affidavit of documents, he may administer interrogatories, and thus obtain further information." The interrogatory which has been administered here is as specific as the nature of the case will admit of, and it is not a fishing one. It is not put in a general form, but is pointed at a specific thing, and the Plaintiff is entitled to a better answer: *Newall* v. *Telegraph Construction Company* (3); so that he may see whether the specific document to which he directs his question will be of use to him or not at the trial of the action. The question which has been asked can be answered by "yes" or "no," and setting forth the nature of the document. If in the affirmative, another question will be whether the Court will order production of it? It is believed that the Defendants have in their possession or power the valuation, or the instructions for the valuation of the property, and they ought to be required to answer the question, which is very precise, and which has been put *bonâ fide*.

[They also referred to *Compagnie Financière et Commerciale du Pacifique* v. *Peruvian Guano Company* (4), and *Catt* v. *Tourle* (5), and

(1) 5 Q. B. D. 556.
(2) Ibid. 559.
(3) Law Rep. 2 Eq. 756.
(4) 11 Q. B. D. 55.
(5) 18 W. R. 966.

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KAY, J., referred to *Lyell* v. *Kennedy* (1), and to the late Master of the Rolls observations in that case (2)].

Hastings, Q.C., and *P. S. Gregory*, for the Defendants:—

It is submitted that the case of *Jones* v. *Monte Video Gas Company* (3) does not apply here, and though the *dicta* of the Judges who decided that case are very important they must be considered in reference to the facts before them. The Plaintiff can at the proper time elicit information from the Defendants for the purpose of seeing whether the document will be relevant or not, and if he gets an answer shewing that it is, then of course he will get production. That is the real meaning of the decision in that case. The interrogatory here is nothing more than asking whether some documents have not been omitted from the affidavit? in other words, is not the affidavit which you have made untrue? The Plaintiff should have asked a question as to the specific document which he alleged or supposes to be in the Defendants' possession: *Newall* v. *Telegraph Construction Company* (4); but nothing is specified in the question. It is directed to a general class of documents relating to the matters in question. The interrogatory has not been properly framed according to the present practice of the Court. The affidavit made is sufficient, and the order made in Chambers ought to be upheld.

W. Pearson, in reply.

KAY, J.:—

Thirty years ago every motion day was much taken up by motions for the production of documents. They were far more numerous than any other kind of motions. At that time the practice was to interrogate. When a plaintiff filed a bill he put in interrogatories as to documents, and there was a common form which was used in those times, which was appended to every set of interrogatories filed, and the defendant, if he wanted discovery, filed his cross-bill, and interrogated in like manner, and in the answer which was sworn by the defendant there was

(1) 8 App. Cas. 217.
(2) 20 Ch. D. 484.
(3) 5 Q. B. D. 556.
(4) Law Rep. 2 Eq. 756.

included the answer to the plaintiff's interrogatories. Then came a regular war, which was carried on generally by motions in Court as to the sufficiency of the answers; or motions were made for production of documents which were alleged to be privileged, and so on. That flourishing of weapons before the parties got to the trial of a suit in equity became a most formidable inconvenience. It was a mode in which parties might be exceedingly embarrassed, and in addition large costs incurred, before the parties came into Court to have the question between them tried. Then a remedy was applied by the Act 15 & 16 Vict. c. 86, sect. 18 of which enacted that, "it shall be lawful for the Court, upon the application of the plaintiff in any suit . . . . whether commenced by a bill or by claim, and as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just." A provision was made by sect. 20, that after the defendant had put in a full and sufficient answer to the bill, the Court might make an order for production on oath by the plaintiff.

Very soon afterwards an attempt was made to search the conscience of the party putting in an affidavit by cross-examining him; a new practice introduced about that time, at any rate so far as *vivâ voce* examination went; and in *Manby* v. *Bewicke* (1) it was formally decided, and the decision has always been acquiesced in, that the common affidavit of documents could not be made the subject of cross-examination. That was about 1856, very soon after the new practice was introduced. In 1866 the question came before Vice-Chancellor *Kindersley* in the case of *Piffard* v. *Beeby* (2), where, notwithstanding the new practice under which an order for documents could be obtained, the plaintiff put in the usual interrogatories as to documents, and it was decided by the Vice-Chancellor that "a defendant may decline to answer the

(1) 8 D. M. & G. 470. (2) Law Rep. 1 Eq. 623.

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usual interrogatory as to documents. It is sufficient if he expresses his willingness to make the affidavit prescribed by the new practice, and it makes no difference whether the exception as to documents is a single exception or is included among others." That has never been departed from. I have known that case followed without any exception. It has always been the practice since that decision, as far as I know, that where a party has been interrogated as to documents he may answer, "I have made the usual affidavit and I refer to that," or he may say, as in that case, "I am quite willing to make the usual affidavit as to documents, and I decline to answer this interrogatory." Both modes of declining to answer have been recognised and sanctioned by the practice of the Court.

The new rules as to the discovery of documents provide that (Order XXXI., rule 12), "Any party may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court or Judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion, be thought fit." There is no specific provision in the new rules as to cross-examination, nor as to any right to interrogate as to documents.

In this case there has been a statement of claim filed by the Plaintiff, and a statement of defence filed by the Defendants. After the statement of defence was put in and the issues between them were perfectly well-known, the Plaintiff obtained the usual order for an affidavit of documents, and the affidavit was made by one of the Defendants. I am told that it is quite sufficient and that no exception can be taken to it. Without amending his pleadings, or altering the issues between the parties in any way, an interrogatory is put in by the Plaintiff under general leave obtained to interrogate, not any leave obtained to put in this particular interrogatory. [His Lordship read the interrogatory.] It has been decided that there cannot be any cross-

examination. Can the Plaintiff, without stating any new fact or altering the issue in his pleadings, put in an interrogatory like this after having got an affidavit to which he cannot take any exception? The case of *Jones* v. *Monte Video Gas Company* (1) has been referred to. In that case an affidavit of documents had been made, and the Court of Appeal decided that it was conclusive against the party seeking discovery. Lord Justice *Brett* said (2) "We have consulted all the other members of the Court of Appeal who usually sit and act, and we are of opinion that the rule to be observed is as follows: either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the Master or Judge is of opinion that the affidavit is insufficient he ought to make an order for a further affidavit; but except in cases of this description no right to a further affidavit exists in favour of the party seeking production," and he added: "It cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient," and afterwards he said: "Another remedy, however, may be used by the party seeking production. He can administer interrogatories; and interrogatories properly framed may force a person to disclose what documents he has in his possession, and the party requiring the production will thereby avoid committing any breach of the practice as to affidavits of documents." Lord Justice *Cotton* said (3): "When an affidavit of discovery was sought it could not be contradicted, and must have been taken to be sufficient, unless from the documents referred to, or from an admission in the pleadings of the party from whom discovery was sought, or from the affidavit itself, it could be gathered that some documents were withheld. The object of this practice was to prevent a conflict of affidavits as to whether the affidavit of documents was sufficient. I think that a similar practice ought to be followed now, and my view is supported by the opinion of the other Judges of the Court of Appeal. I wish, however, to remark that if the

(1) 5 Q. B. D. 556. (2) 5 Q. B. D. 558.
(3) 5 Q. B. D. 559.

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party seeking production is dissatisfied with the affidavit of documents, he may administer interrogatories, and thus obtain further information."

If I am to understand those words in the largest sense which can be given to them they mean this: nobody can cross-examine, and nobody can file contentious affidavits in opposition, but the party who has got an affidavit of documents with which he is not satisfied may administer interrogatories. If that be the meaning it will justify this interrogatory, so far as I have read it, being put in the most general possible form, notwithstanding that an affidavit as to documents has been put in; but I am quite satisfied that the learned Judges meant nothing of the kind, and my opinion is exactly the contrary. It would be ridiculous to say that the plaintiff cannot cross-examine a deponent upon his affidavit of documents, but that he may interrogate him to any extent he likes, and in the vaguest and most general manner. That is not, I apprehend, the practice of the Court. I do not know of, nor has there been cited any authority justifying a practice of the kind, and I am quite satisfied the learned Judges meant nothing of the sort. If reference be made to the particular question before them and to the language of the Master of the Rolls it will be seen that he said:—"He can administer interrogatories; and interrogatories properly framed may force a person to disclose what documents he has in his possession."

I do not understand that there has been any doubt raised as to the practice. I understand counsel to admit that an interrogatory generally framed will not do. But then it was said this interrogatory is specific. [His Lordship referred to the latter part of the interrogatory.]

It was said that makes the interrogatory specific, and certainly that is the oddest construction of the word "specific" that I ever heard suggested. It is quite obvious, looking at the interrogatory, and at the last part of it, that the interrogating party does not know of any such document being in existence. He imagines that there is, and this is a fishing interrogatory to find out whether there be such a document or not. Is that specific? If that be the right practice it comes to this, that the Plaintiff, having no knowledge whatever of the existence of any document,

may exhibit an interrogatory to the party who has put in a perfect affidavit of documents, and may by means of an interrogatory cross-examine him to any extent he likes. But is that the practice? It is so entirely a novelty to me that unless I am directed by the *dicta* of the Court of Appeal in the case of *Jones* v. *Monte Video Gas Company* (1) to follow it I shall decline to do so. What are the authorities on the subject? There are but two which have been referred to, and which in the least degree justify the suggestion which has been made; one is the case of *Newall* v. *Telegraph Construction Company* (2), which came before Vice-Chancellor Sir *W. Page Wood*. In that case a bill was filed, and the defendants put in an answer, and having put it in they obtained an order for the plaintiff to make an affidavit of documents. Then, after they had got their affidavit, to the sufficiency of which they did not except, they filed a concise statement, in which they made a number of statements of particular facts, which they alleged had occurred, and they asked whether the plaintiff had not (in the usual wide form of interrogatory) documents in some way relating to some or one and which of the particular electric cables stated in that statement to have been laid down. The Vice-Chancellor thought that that was a case in which, having drawn attention to particular facts specifically by the concise statement that preceded the interrogatory, the parties were at liberty to interrogate and ask whether the plaintiff had not documents relating to those specific facts and events which he referred to, and that notwithstanding in the answer these same specific facts had been referred to, because it was not necessarily an interrogatory as to the mere issues in the cause, but this was an interrogatory as to documents relating to particular facts which it was thought were material to the defendants' defence, and he was entitled to search the conscience of the plaintiff as to that. It does not seem to me that I have anything like that before me now, and therefore that case is not an authority for the practice which is attempted here.

The other case is *Catt* v. *Tourle* (3), which came before Vice-Chancellor *Stuart*. In that case specific documents were particularly mentioned, and the interrogatory was whether or not

(1) 5 Q. B. D. 556. (2) Law Rep. 2 Eq. 756.
(3) 18 W. R. 966.

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those specific documents were relevant. Here I have no specific document mentioned at all. I have nothing but an expansion of the general interrogatory as to documents by suggesting the existence of certain classes of documents as to which it is quite evident the interrogating party has no knowledge whatever. It is simply putting into a more precise form, if it can be called so, the general interrogatory of documents, and in fact it is simply doing this in order to make out whether the affidavit which has been put in upon the present issue between the parties is a sufficient affidavit or not—whether in fact that affidavit is true—by suggesting by the interrogatory certain classes of documents which may or may not exist, and as to which there is no evidence whatever. There is nothing either in the pleading or affidavit of the parties from which the Court can draw any conclusion whether there are documents of this kind or not. To my mind this is merely putting a general interrogatory as to documents into another form scarcely less general, and I know of no practice of the Court which justifies this. It seems to me that it would be extremely inconvenient to allow it, and I will not be the first Judge to make such an order; therefore I refuse the motion, and with costs.

T. F. M.

C. A.

From this decision the Plaintiff appealed. The appeal was heard on the 4th of March, 1885.

W. Pearson, Q.C., and *E. W. Byrne*, for the Appellant:—

Though the Defendants' affidavit of documents is in form technically sufficient, it does not refer to certain documents which ought to be in the possession of the Defendants, and as to these documents the Plaintiff ought to be allowed to interrogate the Defendants. This is not a mere general fishing interrogatory; it is directed to certain classes of documents which *primâ facie* ought to be in the Defendants' possession. Under such circumstances an interrogatory as to documents is allowable after a sufficient affidavit has been made by the person interrogated: *Jones* v. *Monte Video Gas Company* (1); *Newall* v. *Telegraph Construction Company* (2). Some particular classes of documents

(1) 5 Q. B. D. 556. (2) Law Rep. 2 Eq. 756.

may have escaped the recollection of the Defendants. The pleadings shew sufficient ground for supposing that there are such documents in existence. If the interrogatory had been directed to one particular document, the Defendants would not have been allowed to refuse to answer it, and the same principle applies to a particular class or particular classes of documents. If these documents exist they must be relevant to the matters in issue. It is enough for the Plaintiff to shew reasonable ground for supposing that the documents exist. The Defendants do not say that they do not, or that they have not been overlooked; they only say that they have already made an affidavit as to documents. In *Swanston* v. *Lishman* (1) interrogatories as to documents were allowed after the usual affidavits as to documents had been made.

Hastings, Q.C., and *P. S. Gregory*, for the Defendants, were not heard.

March 5. COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay*, refusing to order one of the Defendants to answer an interrogatory which had been delivered by the Plaintiff for his examination, and which in effect requires him to make a further affidavit as to documents in the possession of the Defendants relating to the matters in issue in the action. The reason assigned by the Defendant for not answering the interrogatory was, that he had already made an affidavit as to documents, to the sufficiency of which it is conceded that no objection could be taken, and that there is nothing which could justify the Court in ordering him to make a further and better affidavit. A party who has made an affidavit of documents cannot be ordered to make a further affidavit unless, either upon the face of the affidavit itself, or of the documents referred to in it, or in his pleading, there is something which affords a presumption that he has in his possession other relevant documents besides those the possession of which he has admitted. In the present case the Plaintiff obtained leave from the Court to deliver interrogatories to the Defendants; but the order only

(1) 45 L. T. (N.S.) 360.

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gave him leave generally to deliver interrogatories—not to deliver any specified interrogatory—and he added to the other interrogatories which he delivered, this interrogatory as to documents. [His Lordship read the interrogatory.] I do not call it a fishing interrogatory, that is not the proper name for it. But it is a general interrogatory, it does not point to the existence of any particular document or documents which may be material to the Plaintiff's case. It is not an interrogatory the answer to which will assist him in making out his case at the trial of the action. The evidence which he hopes to get by means of it is that which he will obtain under an order for the production of documents in case the interrogatory should be answered in the sense that there are such documents in the Defendant's possession. In my opinion Mr. Justice *Kay* was quite right in refusing to order the interrogatory to be answered, the Defendant declining to answer it on the ground that he was really called upon to make a further affidavit as to documents. Though the interrogatory refers to particular classes of documents it is expressed in perfectly general terms. It amounts to a cross-examination of the Defendant on his former affidavit as to documents, and that is a thing which cannot be allowed. *Jones* v. *Monte Video Gas Company* (1) was relied upon for the Plaintiff. But there the question was not whether the administration of interrogatories should be permitted, and nothing which was then said by the Judges of this Court was intended to support, or, in my opinion, does support, the contention of the Appellant that an interrogatory such as this can be allowed. It is difficult no doubt to say what circumstances would justify the putting of an interrogatory as to documents to a party who has already made a sufficient affidavit of documents. But, if the Court is satisfied that, notwithstanding the affidavit, there is or may be some specified relevant document or documents in the possession of the party whom it is desired to interrogate, it may possibly be right to allow an interrogatory to be put whether that particular document, or those particular documents, is or are in his possession. But a *primâ facie* case must be shewn before such an interrogatory can be permitted, and it should be made the subject of a special

(1) 5 Q. B. D. 556.

application. Suppose that there was an issue as to a particular document which, *primâ facie*, ought to be in the possession of a defendant, it may be (I do not say it would) that it would be proper to allow him to be interrogated about it, though he had already made a sufficient affidavit as to documents. But in any case it must be a matter for the discretion of the Judge to say whether he thinks it right to allow this to be done. And in my opinion, it would never be right to allow a general roving searching interrogatory, such as this is, to be put.

FRY, L.J.:—

I am entirely of the same opinion. The Defendant has already made an affidavit as to documents, which is admitted to be adequate. It is admitted that there is nothing in the pleadings, or in the affidavit, or in the documents referred to in it, which can afford any ground for ordering him to make a further affidavit as to documents. The Plaintiff has administered an interrogatory which amounts to a demand for a second affidavit as to documents; it is an attempt to put the Defendant a second time on the rack with regard to the discovery of documents. I think that such an attempt is entirely wrong, and contrary to the practice of the Court. Under the old practice the Court endeavoured to prevent the establishment of two methods for obtaining the discovery of documents, and if a defendant said in answer to an interrogatory, I am willing to make the usual discovery upon a summons for that purpose, and therefore I decline to answer the interrogatory, that answer was always held to be sufficient. Still, no doubt, the practice was in some cases to allow an interrogatory as to specified documents to be administered, and it is this practice which was referred to in *Jones* v. *Monte Video Gas Company* (1). I will not attempt to define in what cases this may be done; but, in my opinion, it is the duty of the Court to watch with care and some jealousy any attempt to establish two methods of obtaining the discovery of documents. Moreover, the question whether such an interrogatory should be allowed to be administered, or required to be answered, is a matter for the discretion of the Judge in each case. I do not mean to say that it is a discretion the exercise of

(1) 5 Q. B. D. 556.

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which cannot be appealed from, but the Court of Appeal will be very unwilling to interfere. I can see no reason for saying that in the present case the Judge has not exercised his discretion properly. Even if the interrogatory had been limited to the six particular classes of documents which are mentioned, I think it would have been objectionable. I think the Defendant ought not to be compelled to answer it. The appeal must be dismissed with costs.

Solicitor for Plaintiff: *W. W. Gabriel.*
Solicitors for Defendants: *Hanbury, Hutton, & Whitting.*

W. L. C.

C. A. 1885 *Feb.* 27.

VINT *v.* HUDSPITH.

[1880. V. 047.]

Practice—Judgment by Default—Appeal—Rules of Supreme Court, 1883, *Order* XXXVI., *r.* 33.

Although the Court of Appeal has jurisdiction to hear a direct appeal from a judgment by default, such appeals will not be encouraged. The proper course for a party against whom judgment has been given by default is to apply to the judge who heard the cause to set aside the judgment and to re-hear the cause.

ON the 26th of April, 1880, the Plaintiff, *Mark Vint*, and his wife brought an action against *H. Hudspith*, claiming accounts of the partnership between the Defendant and *J. L. Hudspith*, his son, of whose estate Mrs. *Vint* was the personal representative.

The action was set down for trial on the 16th of May, 1881, but the pleadings were amended, and by consent the trial was postponed till the Easter sittings in 1882.

On the 13th of April, 1882, the Plaintiff *Mark Vint* filed a petition for liquidation by arrangement, and at the first meeting of his creditors a trustee was appointed, and he obtained his discharge.

The action came on for trial before Mr. Baron *Pollock* on the 27th of April, 1883, when, the Plaintiffs not appearing, the action was dismissed with costs.

On the 25th of July, 1883, the Defendant's costs were taxed at £107 1*s.* 2*d.*, and in August, 1883, a writ of *elegit* was obtained by the Defendant on the dwelling-house and shop of the Plaintiff *Mark Vint*. The Plaintiff knew nothing about the trial of the action; having, as he alleged, given his solicitors instructions prior to his liquidation to abandon the action; and on the 4th of September he obtained an order from Mr. Justice *Pearson*, the vacation Judge, upon notice to the Defendant, restraining the Defendant and the sheriff from seizing the Plaintiff's goods, but the order was made conditional on the Plaintiff bringing the money into Court and undertaking to appeal from the judgment in the action.

The Plaintiff, *Mark Vint*, accordingly appealed from the judgment of Mr. Baron *Pollock*.

Pollard (*J. L. Walton*, with him), for the Appellant.

Creed, for the Defendant, took the preliminary objection that the Plaintiff ought to have made an application to the Judge in the Court where the action was tried to set aside the judgment and restore the action. Until that had been done he had no *locus standi* to appeal. He referred to Order XXXVI., rule 33, and to *Walker* v. *Budden* (1), and *Allum* v. *Dickinson* (2).

Pollard, for the Plaintiff:—

The six days limited by the order had elapsed long before the Plaintiff heard of the judgment against him. The Defendant is estopped from making the objection by the order made by Mr. Justice *Pearson* directing an appeal to be brought. The Court of Appeal has jurisdiction to make what order is just under the circumstances: Order LVIII., rule 14.

COTTON, L.J.:—

We are of opinion that the Plaintiff's proper course was to apply to the Judge to restore the cause on the ground that the Plaintiff was absent *per incuriam*. I am far from saying that this Court cannot entertain an appeal from a judgment made by default, but in a case like the present it is important to prevent the

(1) 5 Q. B. D. 267. (2) 9 Q. B. D. 632.

C. A. 1885 VINT v. HUDSPITH. Cotton, L.J.

Court of Appeal from being flooded by having to hear cases in the first instance. It is therefore right that the Plaintiff should first apply to the Judge who gave the judgment to restore the action. It cannot be said that the Plaintiff did not know that the action was going on against him. He has only himself to thank for all the difficulty that has occurred. The appeal must stand over for a fortnight, to give time for the Plaintiff to make such application to the Judge as he may be advised.

BOWEN, L.J.:—

I agree with the rule as expressed by the Lord Justice, and also with the qualification which he has stated. I should be sorry to decide that the Court has not jurisdiction to entertain an appeal from a judgment given by default; but it is equally clear that it is a bad practice to encourage parties to come here without having the cause in the first instance tried by the Court below.

The Plaintiff, *Mark Vint*, accordingly applied to Mr. Baron *Pollock* to rehear the action. On the 8th of June his Lordship dismissed the motion with costs, holding that *Mark Vint* had no interest in the action, and therefore nothing passed to the trustee in his liquidation.

Solicitors: *J. E. & H. Scott, for R. Brown, Newcastle; Nash & Field, for Hoyle, Shipley & Hoyle, Newcastle.*

M. W.

PARNELL *v.* MORT, LIDDELL, & COMPANY.

C. A. 1885 March 5.

[1881 P. 177.]

Costs—Discretion—Patent Law Amendment Act, 1852 (15 & 16 *Vict. c.* 83), *s.* 43 [*Revised Ed. Statutes, vol. xi. p.* 485]—*Lord Cairns' Act* (21 & 22 *Vict. c.* 27) [*Revised Ed. Statutes, vol. xiii. p.* 268]—*Sir J. Rolt's Act* (25 & 26 *Vict. c.* 42) [*Revised Ed. Statutes, vol xiv. p.* 60].

In an action in the Court of the County Palatine to restrain infringement of a patent the Defendants delivered particulars of objection. At the trial the Judge held the patent invalid for an objection appearing on the face of it, and dismissed the action with costs, stating his opinion that the Defendants ought to have the costs of the witnesses brought up to support their particulars of objection, though they had not been called, as the Plaintiffs virtually had been non-suited. On taxation the Registrar disallowed these costs, but the Vice-Chancellor held that they must be allowed. The Plaintiffs appealed:—

Held, that neither *Lord Cairns' Act* (21 & 22 Vict. c. 27) nor *Sir J. Rolt's Act* (25 & 26 Vict. c. 42) made it obligatory on a Court of Equity to follow the rule as to costs of particulars of objections laid down by the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83), s. 43, and that the rule which applied to Courts having no discretion as to costs ought not to be followed by analogy by a Court which had discretion as to costs; that the Vice-Chancellor had therefore power to give these costs, and that they must be allowed.

THIS was an action to restrain infringement of a patent. The Defendants delivered particulars of objection. The action was tried by the Vice-Chancellor of the County Palatine of *Lancaster*. His Honour held that the patentee had by his specification claimed three things; that the claim for one of them was bad, and that, as there was no disclaimer, the patent was invalid. The action was therefore dismissed with costs, the Plaintiffs being virtually non-suited. The witnesses who were in attendance on behalf of the Defendants to give evidence in support of the objections were not called, and the Court was not in a position to decide as to the validity of the objections. The Vice-Chancellor in giving judgment stated that in dismissing the action with costs he desired it to be understood that he intended to give to the Defendants the costs of their witnesses who actually attended, though they were not called. Counsel for the Plaintiffs then

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referred to the *Patent Law Amendment Act*, 1852, and to *Honiball* v. *Bloomer* (1), and contended that there was no power to give these costs. The order was drawn up simply dismissing the action with costs.

The Registrar in taxing the costs disallowed all the Defendants' costs relating to their particulars of objections, including the costs of their witnesses who attended but were not examined. The Defendants took objections to the certificate, the first of which was that the Court did not come within the operation of the *Patent Law Amendment Act*, 1852. The Registrar disallowed the objections, but the Vice-Chancellor, on a motion to vary the certificate, held that the objection of the Defendants was well founded, and referred it back to the Registrar to review his taxation on that footing. The Plaintiffs appealed, and the appeal was heard on the 5th of March, 1885.

Neville, and *V. S. Browne*, for the Appellants:—

At the time when the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83), was passed the Court of the County Palatine had no jurisdiction to try the validity of a patent; it had to be tried at common law. *Lord Cairns' Act* (21 & 22 Vict. c. 27), s. 3, gave a Judge in Chancery and the Judge of the Court of the County Palatine the same jurisdiction as a common law judge had. Now that jurisdiction was limited by sect. 43 of the *Patent Law Amendment Act*, and the jurisdiction in Chancery must be subject to the same limitation. So under *Sir J. Rolt's Act* (25 & 26 Vict. c. 42) the jurisdiction is transferred subject to its limitations. It has always been the practice, both in the Court of Chancery and the Court of the County Palatine, for the Judge to give a certificate such as is mentioned in sect. 43, viz., that the objection has been proved.

[*Aston*:—I admit that; but it has never been decided that such a certificate is necessary.]

The enactment is one for the benefit of a particular class of persons, viz., patentees, and it cannot have been intended to repeal it by the general expressions in *Lord Cairns' Act* and

(1) 10 Ex. 538.

Sir J. Rolt's Act. *Honiball* v. *Bloomer* (1) shews that if there is no trial the costs cannot be given, and it was recognised as binding in *Batley* v. *Kynock* (2). *Greaves* v. *Eastern Counties Railway Company* (3) is distinguishable, for the case there never came before the Court at all. The analogy of common law is to be followed as closely as may be in patent cases: *Finnegan* v. *James* (4).

[FRY, L.J.:—Does that case decide that the provisions of the *Patent Law Amendment Act* as to points of practice are binding on Courts of Equity?]

It decides that they are to be followed by analogy, which for the present purpose comes to the same thing. In *Daw* v. *Eley* (5) the practice under the Act was followed.

[COTTON, L.J.:—That case related to sect. 41, which was a regulation for ensuring a fair trial, and therefore ought to be followed. Sect. 43 was a rule applicable to a Court which had no discretion as to costs. The Court of Chancery had a discretion as to costs, which enabled it to prevent injustice. Ought it then to follow by analogy a rule as to costs, which applied to a Court having no such discretion?]

Fernie v. *Young* (6) decides that the Courts ought to try actions under *Sir J. Rolt's Act* and *Lord Cairns' Act* in the same way as Courts of Common Law previously did, and that all the incidents are the same. The rules of the Palatine Court, made under the *Court of Chancery of Lancaster Act*, 1850 (13 & 14 Vict. c. 43), ss. 1, 2, contain a provision identical with Order LV. of the General Rules of 1875, but we say that this Act does not authorize the making a rule which would repeal sect. 43 of the *Patent Law Amendment Act*.

Aston, Q.C., and *Rotch*, *contrà*, were not called on.

COTTON, L.J.:—

This is an appeal from a decision of the Vice-Chancellor of the County Palatine, reversing a decision of the Registrar on a point

(1) 10 Ex. 538.
(2) Law Rep. 20 Eq. 632.
(3) 1 E. & E. 961.
(4) Law Rep. 19 Eq. 72.
(5) Ibid. 1 Eq. 38.
(6) Ibid. 1 H. L. 63, 72.

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of taxation. The question is whether the Defendants on taxation are entitled to the costs of witnesses called to substantiate objections to the validity of the patent, of which objections the Defendants had given particulars. The Judge dismissed the action without hearing the Defendants, so that the witnesses were not examined and the validity of the objections was not tried. The Judge thought that he ought to give these costs, but he could not give a certificate such as is mentioned in the *Patent Law Amendment Act*, 1852, s. 43, inasmuch as the objections had not been proved. His Honour therefore simply dismissed the action with costs, leaving the question to the Registrar, who disallowed these costs. The Vice-Chancellor decided that they ought to be allowed, and from that decision the present appeal is brought.

The Appellants rely on 15 & 16 Vict. c. 83, s. 43, which enacts that, "In taxing the costs in any action in any of Her Majesty's Superior Courts at *Westminster* or in *Dublin*, commenced after the passing of this Act for infringing letters patent, regard shall be had to the particulars delivered in such action, and the plaintiff and defendant respectively shall not be allowed any costs in respect of any particular, unless certified by the Judge before whom the trial was had to have been proved by such plaintiff or defendant respectively, without regard to the general costs of the cause."

That section is not in its terms binding on the Court of the County Palatine, but it is urged that it ought to be considered binding by way of analogy, when a Court of Equity decides legal questions under *Lord Cairns' Act* or *Sir John Rolt's Act*. *Honiball* v. *Bloomer* (1) was relied on as deciding that, where there has been no such trial as to enable the Judge to say that the objections are proved, the costs cannot be allowed. We need not determine whether that decision was right or wrong. We only say that we must not be considered as expressing our approval of it.

Sir John Rolt's Act does not make the 43rd section binding on the Court of the County Palatine any more than on the Court of Chancery. It enabled the Court of Chancery to decide legal

(1) 10 Ex. 538.

questions, but it did not interfere with the discretion which the Court of Chancery always exercised, but which Courts of Common Law had not, to dispose of the costs according to justice. The legal rights of the parties were not indeed altered because they were tried by another Court, but it would be wrong to say that the discretion of the Court of Chancery as to costs is therefore taken away. When the Court of Chancery had to deal with matters usually dealt with by the Courts of Common Law, that Court rightly followed by analogy the rules of the Common Law in deciding the rights of the parties. But it would not be right that the Court of Chancery, which always had a discretion as to costs, which enabled it to do justice, should follow by analogy an enactment which in terms applied only to a Court which had no such discretion. To follow sect. 41 by analogy is quite a different matter. That section was intended to give parties proper notice of the case they had to meet, and as it dealt with a matter essential to deciding on the rights of the parties, it ought to be followed by analogy. Sect. 43 stands on quite a different footing; there is nothing in *Sir John Rolt's Act* to oblige a Court of Equity to follow it, and in my opinion it ought not to be followed.

BOWEN, L.J.:—

I am of the same opinion. Under Order LV. of the General Orders of 1875, which has been adopted in the Court of the County Palatine, the Judge had power to deal with these costs, unless the adoption of that rule was *ultrà vires*. The Appellants rely on sect. 43 of the *Patent Law Amendment Act*, and say that it imposes a fetter on the discretion of the Judge. Now that section in terms only applies to the superior Courts of Common Law. Then *Sir John Rolt's Act* gave a common law jurisdiction to the Court of Chancery and the Court of the County Palatine, and it is urged that the latter Court ought in the taxation of costs to follow sect. 43. I do not think that the Acts which gave common law jurisdiction to the Court of Chancery were intended to fetter the discretion of that Court as to costs. It seems to me impossible to hold that the Court of the County Palatine is bound in any case to follow this section, for the *Judicature Acts* have entirely altered the rules as to costs, and a

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common law Judge has now absolute discretion as to costs, there being nothing to exclude any particular class of actions from that discretion. If sect. 43 is no longer binding it would be wrong to follow a vanished analogy. I entertain some doubt as to *Honiball* v. *Bloomer* (1), but the point will probably never arise again.

FRY, L.J.:—

In 1858 *Lord Cairns' Act* was passed, which enabled the Court of Chancery and the Court of the County Palatine to try questions which previously had to be sent to be tried at law. In 1862 *Sir John Rolt's Act* made it obligatory on the Court of Chancery and the Court of the County Palatine to try every question of fact or law on which the title to equitable relief might depend. At the time when these statutes were passed, there was a known practice in the Courts of Common Law as to these questions of fact, and there was a rule as to certain costs in patent actions. The Court of the County Palatine was probably bound to follow the course of practice in the trial of those actions as nearly as it could. Now, how did matters then stand with respect to jurisdiction as to costs? In the Courts of Common Law there was no discretion as to costs; they were governed by certain statutory regulations, among which was the provision in sect. 43 of the *Patent Law Amendment Act*. On the other hand in the Court of Chancery and in the Court of the County Palatine there was an unlimited discretion as to costs. Was it then the effect of *Lord Cairns' Act* or *Sir John Rolt's Act* to take away the discretion of the Court of Chancery, or of the Court of the County Palatine, as to costs, in the cases which they enabled those Courts to try? Or was the effect of those Acts to extend the discretion to the trial of issues of fact? Is the Court of the County Palatine bound by the *Statute of Gloucester* as to costs in an action to restrain a nuisance, or by the *Patent Law Amendment Act*, 1852, in an action relating to a patent? I think that it is bound neither in one case nor in the other. It would be wrong to hold the discretion of the Court to be fettered by statutory directions which related only to common law actions. If the

(1) 10 Ex. 538.

Legislature had intended to introduce these limitations as to costs it would have said so. If *Lord Cairns' Act* and *Sir John Rolt's Act* do not impose the then existing provisions as to costs at common law, nothing has been since done to impose them.

Solicitors for Plaintiffs: *F. Venn & Co.*, agents for *H. W. Collins & Co. Liverpool.*

Solicitors for Defendants: *Crowdy, Son, & Tarry*, agents for *Walter Weld, Liverpool.*

H. C. J.

In re DICKSON.
HILL *v.* GRANT.

[1884 D. 2386.]

Contingent Legacy to Infant—Intermediate Income—Maintenance—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

Sect. 43 of the *Conveyancing and Law of Property Act*, 1881, empowering trustees to apply towards the maintenance of an infant the income of property held in trust for him contingently on his attaining the age of twenty-one years, does not authorize the allowance of maintenance where, apart from the Act, the infant on attaining twenty-one would only be entitled to the legacy without interest.

Decision of *Kay*, J., affirmed.

THE testator, by will made in 1883, gave "to each of the children who shall be living at my death and attains twenty-one, of the following persons, viz." (here followed the names of his three half-sisters, his half-brother, and a niece) "the sum of £1000; and in case any of the children of my said half-sisters, half-brother, or niece shall die in my lifetime, leaving children who shall be living at my death and attain twenty-one, then I give a sum of £1000 to and equally between such children of each child of my said half-sisters, half-brother, or niece so dying." The testator directed his executors and trustees to hold his residuary estate in trust for his nephews and nieces living at his death in equal shares. The testator did not stand *in loco parentis* to any of the legatees of £1000.

Several of these legatees being infants, a summons was taken

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out to obtain the decision of the Court on the question whether maintenance could be allowed to them out of the income of their legacies. The trustees had set apart a sufficient sum to answer these legacies. Mr. Justice *Kay* decided that maintenance could not be allowed (1). The infant legatees appealed, and the appeal was heard on the 9th of March, 1885.

Hastings, Q.C., and *H. McNab Humphry*, for the Appellants:—

By sect. 26 of *Lord Cranworth's Act* (23 & 24 Vict. c. 145), trustees were empowered to apply to the maintenance of an infant the income to which the infant was entitled in respect of any property held in trust for him either absolutely or contingently on his attaining twenty-one. Under this it was held in *In re Cotton* (2) that trustees could apply the income of a fund for the benefit of persons entitled to it contingently on their attaining twenty-one, when on attaining twenty-one they would be entitled to both capital and income, though the income along with the capital would, according to the terms of the will, go away from them if they died under twenty-one. This section is repealed by sect. 71 of the *Conveyancing and Law of Property Act*, 1881, but it is provided that the repeal shall not affect the validity of, or any operative effect or consequence of, any instrument executed, or anything done or suffered, before the commencement of the Act. Then a section (sect. 43) is substituted for the 26th section of the former Act, differing from it materially in its terms. The Act does not refer to the income to which the infant is entitled in respect of the property, as the former Act did, but to the income of the property. This difference of wording indicates a difference of intention. The "contrary intention" referred to in sect. 43 must mean an intention expressed by the instrument, not merely to be implied from it. Mr. Justice *Kay* puts as an argument against our construction of the Act the hardship which would occur, if a residuary legatee who had been entitled to the income of a contingent legacy for years before the passing of the Act, was suddenly deprived of it by the Act, but this hardship would not arise, for sect. 71, sub-sect. 2, provides that the effect of any

(1) 28 Ch. D. 291. (2) 1 Ch. D. 232.

instrument made before the *Conveyancing Act* came into operation shall not be affected by the repeal.

[FRY, L.J.:—It does not say that the Act shall not affect old instruments, but that the repeal shall not. Sect. 43 in terms applies to old instruments.]

In the present case there is no hardship, for the will was made under the new law. The Act was intended to cure the defect in *Lord Cranworth's Act*, which did not secure maintenance to infants in all cases in which it was desirable, as in *In re George* (1). We submit that the decision in this case and in *In re Judkin's Trusts* (2) cannot be supported.

Langworthy appeared for the Plaintiff.

Farwell, for the residuary legatee, was not called upon.

COTTON, L.J.:—

This is an appeal from Mr. Justice *Kay*, his decision being that he could not give directions that the income of certain sums of money to which some infants would become entitled if they attained twenty-one, should be applied for their benefit, the contention of the Appellants being, that sect. 43 of the *Conveyancing and Law of Property Act*, 1881, enabled the Court so to do. That section is somewhat similar to the 26th section of the Act 23 & 24 Vict. c. 145, generally called *Lord Cranworth's Act*, passed in the year 1860, the principal differences between them being, that the later Act extends to wills which came into operation before the commencement of the Act, and that whereas in *Lord Cranworth's Act* what may be applied to the maintenance of the infant, is described as "the whole or any part of the income to which such infant may be entitled in respect of such property," the description in the present Act is "the income of that property or any part thereof."

The facts of the case are these. The will was made in 1883, after the Act came into operation, and it gave several sums of £1000 to certain persons contingently on their attaining twenty-one. It did not in any way direct that the sums should be set

(1) 5 Ch. D. 837. (2) 25 Ch. D. 743.

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apart, or in any way dealt with by the trustees and executors as separated from his general estate, and then there is a gift of the residue of the estate to the testator's nephews and nieces living at his death, in equal shares. As a matter of fact the trustees and executors, these contingent legatees being under twenty-one, did set apart such a sum as would enable them to pay the legacies if and when they should become payable, but that in my opinion can make no difference, as it is not a separation directed by the will, but a mere arrangement for the more convenient dealing with the estate.

Now what is the law under these circumstances? Independently of the effect of sect. 43 of this Act, the interest on the sums of £1000 which are to be paid if and when these persons respectively attain twenty-one, will in the meantime fall into the residue, and although the trustees have separated as a matter of fact these sums from the residue, they still, until the infants respectively attain twenty-one, form part of the residue. If and when any one of these children attains twenty-one, there must be taken out of the assets which remain after payment of debts and other legacies the sum of £1000 in order to pay that child's legacy. Up to that time it is part of the residue, and it is uncertain whether it ever will have to be separated from the residue. The income in the meantime undoubtedly goes to the persons who are entitled to the residue. We must bear that in mind in considering the effect of the statute. Sect. 43 is this: "Where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not." This differs from *Lord Cranworth's Act* in the way which I have mentioned. Then we have a provision which also is found in *Lord Cranworth's Act*, that the trustees shall accumulate all the residue of the income

by way of compound interest, and hold it for the benefit of the person who ultimately becomes entitled to the property from which the same arose. Then there is another provision which is important, that the section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and then it shall have effect subject to the terms of the instrument. Another sub-section declares that the section applies whether the instrument comes into operation before or after the commencement of the Act. In my opinion that last sub-section is very material, as also sub-sects. 2 and 3, but if these sub-sections were out of the way I should not arrive at any other conclusion than that at which I have arrived.

What is contended for is, that although if the infant attains twenty-one this income would not go to him, yet the effect of the 43rd section is that the trustees may apply that income for his maintenance. If they can do so, then the directions of the Act are plain, viz., that they must accumulate whatever is not required for maintenance, and that this is to go to the person becoming entitled to the property. One may very well suppose a case of a legacy given to an infant if that infant attains twenty-one, and if not, then to some other person who at the time of the will was an adult perfectly capable of earning his own livelihood, and not in any way requiring that protection which is given to infants, and which it is supposed that here the Legislature intended to extend to infants. Is it reasonable that if the infant dies under twenty-one that adult legatee should take the accumulation? Independently of this statute the income up to the death of the infant would have gone to the residuary legatee, and not to the person entitled under the alternative gift, who, if the infant did not attain twenty-one, would be entitled, not to the legacy and income, but to the simple sum of £1000. In my mind nothing can be more startling than this, and if the Legislature had intended anything of that kind we should have expected it to express that intention in clear language.

It was pressed upon us very strongly that if we did not give to this section the construction contended for by the Appellants, we should, in fact, be making this legislation inoperative, and that we must see what was decided under *Lord Cranworth's Act*, and

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say that this enactment was intended to give greater rights, not only to infants, but to other persons, and to alter the whole law as to the income of legacies given in the way in which these legacies are given. We ought, in my opinion, before coming to the conclusion that there is such a violent interference by the Act with the gifts of testators, to find the intention so to interfere expressed in very clear language, and sub-sect. 3 shews that as far as possible the Legislature did not intend, when it applied this section to instruments coming into operation before the commencement of the Act, violently to interfere with the rights of parties interested under those instruments. That, to my mind, leads very strongly to the conclusion that this section does not extend the effect of *Lord Cranworth's Act*. Under that Act it had been decided that the infant could not be maintained out of the income unless, if he had attained twenty-one, he would have become entitled to the past income as well as to the *corpus* of the property. In my opinion the case is the same under the present statute. Undoubtedly a few words have been left out, but one cannot guess why they were left out, nor, indeed, why this section was introduced into the Act at all. It was possibly with a view to codify the law. It is said that it must have been introduced to amend the blot found to exist under *Lord Cranworth's Act*. But was it a blot? In my opinion *Lord Cranworth's Act* went a considerable length in enabling the income to be applied for the benefit of an infant who was only contingently entitled, where, if the infant did not attain twenty-one, the whole of the fund, both capital and accumulations, was to go over to somebody else. The present contention goes much further, and I am not at all satisfied that there was any such evil under *Lord Cranworth's Act* as that we ought to come to the conclusion that the words of the present Act are to be extended beyond what I think is their proper significance.

What the Act says is this: "Where any property is held by trustees in trust for an infant either for life or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years." I should say as to each of these sums of £1000 that it did not come within that description, because it was not set apart by the direction of the testator so as

to be held by these trustees for the benefit of the infant, but was only retained by the trustees to enable them to comply with the directions in the will if and when the infant attained twenty-one. Suppose they had not set it apart: could it then be said that the whole of the residue was held upon trust for the infant, because it was held subject to a trust that if the infant attained twenty-one £1000 should be raised out of it. In my opinion, having regard to the provisions of sub-sect. 2, which pressed upon me very much, this section can only apply to a legacy set apart by the direction of the testator, so that the income of the legacy shall go to the infant if he attains twenty-one, and if not, then to the person to whom that legacy is given. Therefore in substance the case is in the same position as under *Lord Cranworth's Act*, though I do not mean to say that, having regard to sub-sect. 3, the effect of this present Act may not in some cases be less extensive than that of *Lord Cranworth's Act*. At any rate, in my opinion, it has not enabled the Court to say, that in this case the sum of £1000 is, within the meaning of the section, property held upon trust for the infant contingently on his attaining the age of twenty-one, so as to enable the Court to direct that the income, which by the testator's will, unless the law is altered by this section, is given to the residuary legatee, is to be applied for the benefit of the infant, and that whatever is not wanted for the infant is not to go over to the person to whom the testator had given it. In my opinion the decision was quite right, and the appeal must fail.

I have omitted to mention the argument founded on the 71st section. It was put in this way, as I understand, that the hardship so strongly urged by Mr. Justice *Kay* as resulting from the Appellants' construction of sect. 43, would not arise, for that the effect of sect. 71 was to secure to testators whose wills came into operation before the present Act, such effect being given to them as would have been given to them if *Lord Cranworth's Act* had been the only Act existing at the time when the operation of the will has to be determined. But, in my opinion, that argument cannot prevail. What the Appellants are contending for is that the effect of wills coming into operation after this Act is altered by the positive enactment of sect. 43 and not by the repeal of *Lord Cranworth's Act*. *Lord Cranworth's Act* gave certain rights

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to infants. It is said that not only greater rights were given to infants by the *Conveyancing Act*, but that there is by the Act an alteration made in the rights of parties to the income of the legacy given contingently on a certain age being attained by an infant. It was urged that sect. 71 prevented the application of that principle to instruments coming into operation before the present Act and saved the rights of any parties taking under those instruments from being affected. That is inconsistent with the last sub-section of sect. 43, and sect. 71 cannot have that effect. The argument gives one effect to sect. 43 as regards wills executed before and coming into operation before the Act, and a different effect as regards wills coming into operation after the Act. In my opinion it is utterly impossible, taking sects. 71 and 43 together, to say that such can be the meaning of this Act, and it would be wrong to give a different construction to a particular section when it is to be applied to an existing instrument, from that which is to be given when it is to be applied to an instrument made after the passing of the Act.

FRY, L.J.:—

Lord Justice *Bowen* desires that, as I have heard the whole of the arguments and he has not, I should next express my opinion.

In this case we have to deal with a will, which, independently of the statute in question, would have given to the infant on attaining twenty-one, and only on attaining twenty-one, a certain legacy, and in the meanwhile, and until the infant attained twenty-one, would have given the income to the residuary legatees. That appears to me to be the plain effect of the will independently of the statute.

Then we have to deal with the 43rd section, in which there are two very remarkable provisions. The one is, that the section is to apply, whether the instrument under which the question arises came into operation before the commencement of the Act or after the commencement of the Act. That evidently shews an intention not to affect the construction of wills, because it would be plainly unreasonable to apply to past wills, a section which is intended to affect the operation and construction of wills. The

other is sub-sect. 3, which declares that the section "applies only if, and as far as, a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained." It appears to me that, taking those two clauses together, they mean that all that has gone before with regard to maintenance is made subject to the will or other instrument under which the infant claims, and that the construction of the will or other instrument is not in terms affected by this section.

That being so, it appears to me that an answer has been given to the contention on the part of the infant. This will, as I have already pointed out, has given the income during the infancy of the legatee to the residuary legatee, and it has given it not by implication but by express words, because there is an express gift of the residue, and that residue includes the income of the legacy. Therefore the contention on the part of the infant is one as to which a contrary intention has been expressed by the testator. It appears to me, therefore, that the 3rd sub-section furnishes a complete answer to this appeal.

In dwelling upon that point, I am not intending to express any opinion at variance with the expression of opinion of Lord Justice *Cotton* on the question whether the property is held by trustees on trust for the infant. I incline to adopt the view which he has expressed. But to my mind the point on the 3rd sub-section is so plain that I prefer individually to treat that as the main ground of my decision.

I will add that in both sub-sect. 3 and sub-sect. 4, this Act differs from *Lord Cranworth's Act*. *Lord Cranworth's Act* was made to apply only in the case of deeds, wills, codicils, or other instruments executed after the passing of the Act, or, in the case of a will, ratified, confirmed, or revived subsequently to the Act, whereas clause 43 of the present Act is made to apply to instruments coming into effect prior to the Act. The clause in *Lord Cranworth's Act* contained no provision subjecting the terms of the statute to any expression of a contrary intention contained in the instrument, whereas this section does contain such a provision.

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There is only one other observation which I desire to make. It was contended that the effect of sect. 71 was to alter what would otherwise be the construction of this 43rd section, and it was put in this way. The 71st section repeals parts 2 and 3 of *Lord Cranworth's Act*, but it enacts further that "the repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act, or any action." It was argued that the effect of sect. 71 was to save the operation of *Lord Cranworth's Act* in regard to all instruments executed before the passing of the present Act. That in my judgment is not the true construction of the 71st section. The simple repeal of *Lord Cranworth's Act* would withdraw from its operation all instruments which had to be construed subsequently to the passing of the present Act, and the 71st section only prevented the repeal from having any effect upon any instrument that had come into effect before the passing of the present Act, but did not in any way postpone the operation of the positive enactment in sect. 43.

For these reasons I agree that the appeal fails, and must be dismissed with costs.

BOWEN, L.J.:—

I agree.

Solicitors: *Sandilands, Humphry, & Armstrong.*

H. C. J.

COLVERSON *v.* BLOOMFIELD.

C. A. 1885 March 11.

[1883 C. 937.]

Ne exeat regno—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), ss. 4, 6 [*Revised Ed. Statutes, vol. xvi., pp.* 112, 113.]

An order was made that a trustee should within seven days after service of the order pay to his *cestui que trust*, the Plaintiff, a sum found due to him by the Chief Clerk's certificate. The Plaintiff could not find the trustee so as to serve the order, and applied for a writ of *ne exeat* on the ground that the trustee was about to go out of the jurisdiction :—

Held, that the case did not fall within the third exception in sect. 4 of the *Debtors Act*, 1869, the trustee not being in default, as the order only directed payment after service and had not been served, and that as the debt was not now due and payable a writ of *ne exeat* could not be granted.

THIS was an action by *H. Colverson* against *Samuel Bloomfield*, a solicitor, and *G. Green*, as the trustees of his marriage settlement, for an account of the proceeds of the sale of a leasehold house comprised in the settlement. The Plaintiff, in the events which had happened, had become solely entitled to the trust property. *Bloomfield*, it was stated, had been the acting trustee. By an order made on further consideration on the 9th of February, 1885, it was ordered that the Defendants "do within seven days after service of this order pay to the Plaintiff *H. Colverson* £1172 12*s.* 2*d.*, being the balance by the Chief Clerk's certificate, dated the 25th of November, 1884, certified to be due from the Defendants *G. Green* and *S. Bloomfield* to the Plaintiff *H. Colverson*."

The Plaintiff could not succeed in serving this order on *Bloomfield*, and on the 10th of March he moved for a writ of *ne exeat regno* against *Bloomfield* on evidence that he was about to leave this country and go to the *Cape Colony*. Mr. Justice *Chitty* refused the application, which was now renewed before the Court of Appeal.

H. B. Buckley, for the application, referred to *Boehm* v. *Wood* (1), *Sobey* v. *Sobey* (2), *Drover* v. *Beyer* (3), *Whitehouse* v. *Partridge* (4), and sects. 4 and 6 of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62).

(1) T. & R. 332.
(2) Law Rep. 15 Eq. 200.
(3) 13 Ch. D. 242.
(4) 3 Sw. 365.

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COTTON, L.J. :—

We are of opinion that, whatever may be the results of our refusal, we cannot grant this application. The first question we have to consider is whether this case is within sect. 4 or sect. 6 of the *Debtors Act*, 1869. If the case is within either of those sections there may be an arrest, certain cases of default being excepted from the general abolition of imprisonment for debt. Sect. 4 excepts, *inter alia*, the case of "default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control." In the present case there has been no default in obeying the order made by the Court, because that order only directs payment within seven days after service on the debtor, and here the order has not been served on him. There is nothing therefore in that section which applies to the present case. Then, by sect. 6, when a plaintiff in a superior Court proves at any time before final judgment that he has a good cause of action to the amount of £50 or more, and that there is probable cause for believing that the defendant is about to quit *England* unless he be apprehended, and that his absence will materially prejudice the plaintiff in the prosecution of his action, the Judge may order the defendant to be arrested and imprisoned. This is an application for a writ of *ne exeat regno* in a case where, if the debt had been legal, there could not have been any imprisonment at common law. The applicant's counsel says that the writ of *ne exeat* is not abolished by the *Debtors Act*, 1869, and that the Court ought to issue it in order to keep the Defendant within the jurisdiction. But in my opinion, if the debt is not now due and payable a writ of *ne exeat* ought not to be issued. The Court of Chancery, in granting this writ, merely proceeded by analogy to the process at common law. At common law arrest on *mesne* process was only applicable to legal debts. The Court of Chancery, by analogy, issued a writ of *ne exeat* where the debt was equitable. In my opinion the objection is fatal, that if this had been a legal demand there could have been no arrest at common law, and by analogy we ought not to grant a writ of *ne exeat*. The debt is only payable *in futuro*, and in such a case the writ ought not to issue. The application must be refused.

BOWEN, L.J.:—

I am of the same opinion. When the case is looked into it clearly is not within either sect. 4 or sect. 6 of the *Debtors Act*, 1869. The granting of a *ne exeat* by the Court of Chancery was a kind of reflection of the common law process of arrest. It seems to me that the Court of Chancery never ordered arrest for an equitable debt except in cases where, if the debt had been legal, the Courts of Common Law would have done so. Now at common law affidavits were required shewing that the debt was payable. So in the form of the writ of *ne exeat* there is a recital that the debt is payable. Here there was no debt payable at the time when the writ was asked for. *Sobey* v. *Sobey* (1), which was cited on behalf of the applicant, is really an authority against him. I agree that the application must be refused.

FRY, L.J.:—

I am of the same opinion. A very serious difficulty in the way of the applicant occurs in sect. 4 of the *Debtors Act*, and with regard to that objection I agree with the other members of the Court. But in my opinion the application fails on another ground. Under the old practice of the Court of Chancery a writ of *ne exeat* was not granted unless the debt was not only due but payable *in præsenti*. That is evident from what was said by Lord *Eldon* in *Whitehouse* v. *Partridge* (2): "The writ can be issued only on an equitable debt, with the single exception, I think, of a balance of account, on which an action may be maintained; and it can be issued only on an equitable debt then due and payable. I recollect a scandalous instance of advantage taken of that rule; a creditor having given time to his debtor from the 1st of January to the 1st of July, in the last week in June the debtor thought proper to attempt to leave the kingdom; and, on great consideration, this Court decided that it could not grant the writ." That case is almost parallel with the present. It appears to me that under the old practice a writ of *ne exeat* could not have been granted in a case like this, and the *Debtors Act* has not extended the practice.

Solicitors: *Layton, Son, & Lendon.*

(1) Law Rep. 15 Eq. 200.

(2) 3 Sw. 377.

H. C. J.

C. A. 1885 March 12.

CARSHORE *v.* NORTH EASTERN RAILWAY COMPANY.

[1884 C. 5497.]

Practice—Third-party Procedure — Claim of Indemnity — Rules of Supreme Court, 1883, *Order* XVI., *r.* 48—*Embarrassing Pleading.*

In giving leave to a defendant to serve notice of claim for contribution or indemnity on a third party, the Court will not consider whether the claim is a valid one, but only whether the claim is *bonâ fide*, and whether if established it will result in contribution or indemnity.

The Plaintiff, who was the owner of stock in a public company registered in her name, ascertained that it had been transferred to *F.* by virtue, as she alleged, of a forged transfer. She brought an action against the company to have her name reinstated in the books of the company. The company obtained leave to serve *F.* with a claim for indemnity:—

Held, by the Court of Appeal, without deciding that the claim for indemnity was valid, that leave to serve *F.* was rightly given.

Speller v. *Bristol Steam Navigation Company* (1) distinguished.

THE Plaintiff, *Emma Carshore*, was the owner of £1050 *Darlington* Preference Stock of the *North Eastern Railway Company*, which was registered in her name.

She deposited the certificates of the stock with *Thomas Fell*, a tea broker, who received the dividends, and accounted for them to her.

In August, 1884, *Fell* absconded, and the Plaintiff, on application at the company's office, discovered that in January, 1880, the stock had been transferred to one *J. A. Farlow* by a deed of transfer professing to be executed by her. She alleged that the deed was never executed by her, and that her signature to it was a forgery.

On the 4th of December, 1884, the Plaintiff brought the present action against the company claiming that her name should be restored to the register of the company, and a new certificate issued to her, and that she should be paid the August dividend, which she had not received.

The company put in a defence on the 23rd of February, 1885, stating that the transfer to *J. A. Farlow*, purporting to be exe-

(1) 13 Q. B. D. 96.

cuted by the Plaintiff, was left with them for registration by *Fell* in January, 1880, and that they registered it under the belief that it was a valid transfer. They also stated that the stock had been since transferred by *Farlow* to several other persons.

On the 10th of February, 1885, the Defendants obtained from Vice-Chancellor *Bacon* in Chambers an order giving them liberty to serve a notice under Order XVI., rule 48, on *J. A. Farlow* claiming to be indemnified by him.

The Plaintiff appealed from this order.

Hornell, for the Appellant :—

The order of the Vice-Chancellor is not justified by Order XVI., rule 48. Under that rule notice can only be given to a third party "where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action." The words "or other remedy or relief," which were in the old rule, are now omitted. Whatever the claim of the company may be against *Farlow* it is not a right to indemnity, which can only arise from contract express or implied: *Speller* v. *Bristol Steam Navigation Company* (1); *Pontifex* v. *Foord* (2); *Catton* v. *Bennett* (3). The claim is frivolous and is calculated to embarrass the Plaintiff. The third party may make a different defence to the Defendants, and raise other questions, which may cause additional delay and expense.

Laing, for the Respondents :—

We have a good claim for indemnity against *Farlow*. Where a transferee presents a transfer to the company for registration there is an implied contract to indemnify them. It is not the duty of the company to make inquiries before they register the transfer. They are guilty of no negligence. They sent out the ordinary notices of the transfer: *Simm* v. *Anglo-American Telegraph Company* (4); *Dugdale* v. *Lovering* (5); *Cottam* v. *Eastern Counties Railway Company* (6); *Johnston* v. *Renton* (7).

(1) 13 Q. B. D. 96.
(2) 12 Q. B. D. 152.
(3) 26 Ch. D. 161.
(4) 5 Q. B. D. 188.
(5) Law Rep. 10 C. P. 196.
(6) 1 J. & H. 243.
(7) Law Rep. 9 Eq. 181.

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The Plaintiff will not be embarrassed by the introduction of a third party. It will be for the advantage of the Plaintiff to have the question of forgery settled in the presence of all parties interested. When the Judge gives directions as to the mode of trying the action he will take care that no needless expense or delay is caused to the Plaintiff: *Benecke* v. *Frost* (1).

Hornell, in reply.

COTTON, L.J.:—

The right to serve notice on a third party is confined by Order XVI., rule 48, to a third party against whom a defendant claims to be entitled to contribution or indemnity. It would be wrong for us on this application to decide whether the Defendants in this case have any right to be indemnified by the person whom they have served, and I do not decide anything on that point. The only question before us is, whether they claim indemnity within the meaning of the rule. They certainly do claim indemnity in their notice. I cannot say that the claim is frivolous, considering the cases which have been cited before us. If it could be shewn that their claim, if substantiated, was not one for indemnity, but for something else, it would have been different; but this is a claim for indemnity within the meaning of the rule.

The Plaintiff says that she ought not to be embarrassed by the introduction into the action of another person who may take a different line of defence. My opinion certainly is that a plaintiff ought not to be embarrassed by the desire of the defendants to have the whole question of their liability decided at once. But that objection is to be met by the Judge when application is made for direction as to the proceedings, under rule 52. It is the duty of the Judge to see that nothing is done to cause additional expense or difficulty to the Plaintiff. The Plaintiff has nothing to do with the question of indemnity which has arisen between the Defendants and the third party. But the question of forgery arises as well between the Plaintiff and the Defendants, as between the third party and the Defendants, and it may well be left to the Judge to see that the question is properly

(1) 1 Q. B. D. 419.

tried, so that the Plaintiff may not be embarrassed or put to additional expense. I think we ought not to discharge the order appealed from.

FRY, L.J.:—

I am of the same opinion. Whether the claim of the Defendants against *Farlow* is well founded or not, it is a claim for indemnity. *Speller* v. *Bristol Steam Navigation Company* (1) was pressed on us; but in that case the Court saw that the claim which the defendant had on the third party was not a claim for indemnity. That was the ground of the decision. If I had thought that in the present case the Defendants' claim against *Farlow* was frivolous I might have come to a different conclusion, but I do not think that it is.

It is suggested that the Plaintiff ought not to be embarrassed by the introduction of questions between the Defendants and a third party. Possibly some delay may be caused by the third-party proceedings, but the object of the rule is to enable the Court to try once for all an issue of fact in which all parties are alike interested. Here all are interested in the question whether the transfer was a forgery, and I think it is best to try it once in the presence of all the parties. The appeal will be dismissed with costs.

Solicitors: *Merriman, Pike, & Merriman; Williamson, Hill, & Co.*, agents for *G. S. Gibb, York.*

(1) 13 Q. B. D. 96.

M. W.

C. A.
1885
March 13.

In re LOVE.
HILL *v.* SPURGEON.

[1881 L. 2191.]

Costs—Costs of Trustee and Executor.

One of two executors and trustees commenced an action against the other for the administration of the estate, and a decree was made. There was no allegation of any misconduct on the part of the Defendant. On the action coming on for further consideration, Mr. Justice *Kay* gave the Plaintiff his costs as between solicitor and client, but gave the Defendant costs only as between party and party, holding that two sets of costs as between solicitor and client ought not to be allowed to the trustees :—

Held, on appeal, that a trustee is entitled to costs as between solicitor and client in an administration action, unless a case of misconduct is made out against him, and that the Defendant must have costs as between solicitor and client.

THE Plaintiff and the Defendant were the executors and trustees of the will of *William Love*, a builder, who died possessed of numerous leasehold properties subject to mortgages. The Plaintiff was also a legatee of £100, and took a beneficial interest in a specifically bequeathed property. The Defendant was a legatee and also the residuary legatee. The Plaintiff, as one of the executors and trustees, commenced this action for the administration of the estate, alleging that questions arose under the will, and on the 14th of January, 1882, judgment was given for accounts and inquiries. The case came on for further consideration before Mr. Justice *Kay* on the 13th of January, 1885, with a summons as to the conduct of the sale of the leasehold estates, a considerable part of which was unsold. By the minutes of order proposed by the Plaintiff it was directed that the costs of the Plaintiff and Defendant of the action should be taxed as between solicitor and client, including in such costs any charges and expenses properly incurred by them respectively in and about the administration of the testator's estate or the execution of the trusts of his will beyond their costs of this action, and should be paid out of the funds in Court. Mr. Justice *Kay* considered that two sets of costs as between solicitor and client ought not to be allowed to

the trustees, and directed that the costs of the Plaintiff only should be taxed as between solicitor and client, but gave the Defendant costs only as between party and party, and his charges and expenses. It was uncertain whether the estate would be sufficient for payment in full of the pecuniary legacies. The order gave the conduct of the sale of the leasehold property of the testator to the Plaintiff. The Defendant had been appointed receiver without salary, and there was no complaint of any kind made against him. The Defendant appealed, asking that his costs might be taxed as between solicitor and client, including charges and expenses properly incurred by him, and might be paid out of the estate, and that the conduct of the sale might be given to him, on the ground that he was the person most interested in seeing that the property was sold to advantage.

W. Pearson, Q.C., and *S. Dickinson*, for the appeal:—

The Defendant as an executor and trustee ought to have his costs as between solicitor and client. These are not costs within the discretion of the Court, the executor is entitled to them unless a case of misconduct is made against him, and no misconduct is even alleged here. If only one set of costs as between solicitor and client is to be given, it should be given rather to the Defendant than to the Plaintiff, for he has acted as receiver without salary, and has brought in the accounts of the estate.

Hastings, Q.C., and *E. Ford*, for the Plaintiff:—

There is no appeal against the order so far as it gives costs as between solicitor and client to the Plaintiff. The only question, therefore, is whether the Defendant ought also to have costs as between solicitor and client, and we leave that in the hands of the Court.

COTTON, L.J.:—

In this case there are two objects in the notice of appeal. As regards the appeal against that part of the order of Mr. Justice *Kay* which gave the conduct of the sale to the Plaintiff, we did not call on the Plaintiff. In my opinion the Court ought not to interfere with the discretion of the Judge as to who is to have

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the conduct of a sale, unless there are some very extraordinary circumstances that require it to do so. I do not say special circumstances, but extraordinary circumstances, and nothing of that kind having been suggested here, the appeal on that point fails.

As regards the other point, both the Plaintiff and Defendant are trustees and executors. As a rule a trustee is entitled to have his costs in an action for administration of the trusts as between solicitor and client, in addition to any costs charges and expenses properly incurred by him, not being costs of the action. If costs only as between party and party are given him in the action, he will not be entitled to his extra costs in that action as charges and expenses, though in an action to administer the trusts he would be entitled to have the difference between his party and party costs and solicitor and client costs in another action between him and strangers, allowed as charges and expenses. Here the Judge only gave the Defendant party and party costs of the administration action, giving him also his charges and expenses properly incurred. Those charges and expenses will not carry the difference between party and party and solicitor and client costs. Ought the Defendant then to have his costs as between solicitor and client? In my opinion a trustee is entitled to costs in the ordinary way, *i.e.*, as between solicitor and client, unless it is established that he has been guilty of some misconduct which would justify the Judge in depriving him of what are the ordinary costs of a trustee. The Judge appears to have gone on the ground that he could not allow to the trustees two sets of costs as between solicitor and client. A desire to prevent the costs of litigation being excessive is laudable, but I think that is not a sufficient reason for depriving the trustee, who admittedly has conducted himself properly in this litigation, of the ordinary trustees' costs, that is, costs as between solicitor and client, and in my opinion he must have them, but as he has failed on one of his two points, we ought not, in my opinion, to give him any costs of this appeal.

FRY, L.J.:—

I am of the same opinion. I entirely sympathise with the desire of Mr. Justice *Kay* to limit the costs as far as possible, but

in this case the Defendant was entitled to his costs as between solicitor and client, and he cannot be properly deprived of them because Mr. Justice *Kay* thought fit to allow the Plaintiff his costs as between solicitor and client.

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As to the conduct of the sale, it is only necessary to say that no case has been shewn to induce this Court to interfere, and I entirely concur in what Lord Justice *Cotton* has said as to the costs of this appeal.

Solicitors for Appellant: *Janson, Cobb, Pearson, & Co.*
Solicitors for Plaintiff: *Darby & Cumberland.*

H. C. J.

LADY DE LA POLE *v.* DICK.

C. A. 1885 *March* 11, 17.

[1875 D. 131.]

Appeal—Order to pay Plaintiff instead of paying into Court—Service on Solicitor—Continuance of Authority of Solicitor.

By order on further consideration the Defendant was ordered to pay money into Court, which was then to be carried to the credit of an action for administering the estate of a testator whose executrix was the Plaintiff in the present action. The Defendant went abroad without complying with the order. On appeal the order was varied by ordering the Defendant to pay the money to the Plaintiff, who was then to pay it into Court in the administration action, such an order being capable of being better enforced against the Defendant's property than the order as originally framed.

The notice of appeal was served on the Defendant's solicitors, who stated that they had ceased to act for him, but they were still his solicitors on the record:—

Held, that as the order on further consideration had not been worked out, they still represented him, and that service of the notice on them was good service.

Whether the solicitors on the record do not continue to represent their client until the expiration of the time allowed for appealing, *quære*.

THE Plaintiff in this action was the executrix of Sir *Reginald De la Pole*, whose estate was being administered by the Court in an action of *In re De la Pole, Maillard* v. *De la Pole* (1874 D. 122). The present action was by leave of the Court brought against *C. C. Dick*, as agent of the testator, for an account of his receipts

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and payments. Judgment was given for an account, and the accounts were taken by an official referee. In June, 1883, the action came on for further consideration and on summons to vary the certificate, and on the 16th of June the certificate was varied by reducing the balance found due to £4390 5*s.*, and it was ordered that *Dick* should on or before the 7th of August, 1883, or subsequently within seven days after service of the order, pay into Court to the credit of *De la Pole* v. *Dick* the £4390 5*s.*, and that the said sum when paid in should be carried over to the credit of the administration action, and the Defendant was in substance ordered to pay the costs of the Plaintiff, setting off the costs of certain parts of the proceedings.

The costs were taxed, and the amount found payable by the Defendant to the Plaintiff for costs, after making the set-off, was £978 12*s.* 11*d.*

Soon after the 16th of June *Dick* went abroad, and it was found impossible to serve him with the order. It did not appear that he was entitled in possession to any property in *England*, but he was entitled to reversionary interests, mostly contingent, in considerable sums, which interests were not capable of being advantageously sold at present, but were likely to prove ultimately to be of considerable value. Under these circumstances it was considered desirable to have the order of the 16th of June, 1883, varied by putting it into such a form that it could be more advantageously enforced. The executrix accordingly applied in the administration action to Mr. Justice *Kay*, to whose Court both actions were attached, for leave to appeal from the order, for the purpose of putting it into a better form, and his Lordship, considering that he had no jurisdiction to vary the order himself, and that the proposed alteration was desirable, gave leave.

The Plaintiff accordingly, on the 13th of June, 1884, gave notice of motion before the Court of Appeal that the order of the 16th of June, 1883, so far as it directed *Dick* to pay the £4390 5*s.* into Court, and directed that sum, when paid in, to be carried to the credit of the administration action, might be reversed or varied, and that in lieu thereof it might be adjudged that the Plaintiff, as executrix of the testator, "do recover against the Defendant the sum of £4390 5*s.*, and do also recover against the

Defendant the sum of £978 12*s.* 11*d.*, the costs certified by the Taxing Master to be payable by the Defendant to the Plaintiff in respect of the costs of the said action. And that the Plaintiff do within fourteen days after receipt of the said sums, or either of them, or any sum on account thereof, pay the same into Court to the credit of *In re De la Pole, Maillard* v. *De la Pole* (1874 D. 122)."

This notice of motion was served on the *London* agents of the solicitor at *Exeter* who had acted for the Defendant in the action. They stated that they had ceased to act for him, but they still were his solicitors on the record, no notice of change of solicitors having been given.

The appeal came on to be heard on the 11th of March, 1885.

Cecil Russell, for the Appellant:—

It is wished to put the order into such a form that it can be effectually enforced. We can obtain a sequestration under the present order, but having regard to the position of the Defendant's property that would be useless. The Plaintiff wishes to have the order in such a form that a charging order can be obtained under it, or proceedings in bankruptcy taken.

No one appeared for the Respondent.

COTTON, L.J.:—

I think that it is right to make the proposed variation in the order, so as to put it into such a form that it can be better enforced.

BOWEN and FRY, L.JJ., concurred.

Cecil Russell:—It must be mentioned that this appeal is brought on upon affidavit of service upon the Defendant's solicitors on the record, who, when they received the notice, stated that they had ceased to act for him. There has, however, been no notice under Order VII., rule 3, of a change of solicitors, and as the solicitors are still solicitors on the record, I submit that the service is good: *Wright* v. *King* (1).

(1) 9 Beav. 161.

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[BOWEN, L.J.:—There can be no doubt that the authority of the solicitor continues until final judgment; but have you investigated the question how far it continues after final judgment?

COTTON, L.J.:—It would be very inconvenient for it not to continue as long as there is a right of appeal.]

The case stood over for this point to be considered, and was placed on the paper again on the 17th of March.

Cecil Russell, for the Appellant:—

The order has not been enforced, and I submit that the solicitor still represents the client. The stat. *Westminster* 2 enacts: "*Qui quidem attornatus vel attorn' habeat potestatem in placitis motis in itinere quousque placitum terminatur vel dominus suus ipsum amoverit.*" Upon this Lord *Coke* (1) says: "By the judgment against the defendant the warranty of attorney is determined; for thereby *placitum terminatur*, but only to sue execution (which is the fruit of the judgment) within the year, and if he sue out execution within the year he may prosecute the same after the year; but if he sue out no execution within the year, then after the year is ended after judgment, his warrant of attorney is determined." This shews Lord *Coke's* opinion that the authority of the plaintiff's attorney continued after final judgment for the purpose of enforcing execution. In *Lawrence* v. *Harrison* (2), where an action was brought against *Harrison* for delivering a *fieri facias* against *Lawrence* in a suit in which *Lawrence* was a party and *Harrison* his attorney, *Rolle*, C.J., says: "The only question is, whether the warrant of attorney be determined by the judgment given in the suit wherein he was retained; and I conceive it is not, for the suit is not determined, for the attorney after the judgment is to be called to say why there should not execution be made out against his client, and he is trusted to defend his client as far as he can from the execution." That covers the present case. In *Hussey* v. *Welby* (3) it was held that a *scire facias* might be sued out by a fresh attorney without an order to change the former one, and in *Batchelor* v. *Ellis* (4) it was

(1) 2 Inst. 378.
(2) Sty. 426.
(3) Say. 218.
(4) 7 T. R. 337.

held that a party bringing a writ of error might do so by a new attorney without leave; but in each case the ground of decision was, that the proceeding was in substance a new action, which takes those cases out of the general rule. In *Butler* v. *Knight* (1) *Kelly*, C.B., lays it down as the general rule that the force of the retainer ends when judgment is recovered. This, I submit, is not a correct statement of the law; it appears to be founded on *Tipping* v. *Johnson* (2), but the decision in that case was overruled in *Bevins* v. *Hulme* (3), where *Parke*, B., says: "We think he was right in contending that the original retainer was not determined by the judgment, but continued afterwards, so as to warrant the attorney in issuing execution within a year and a day, or afterwards, in continuation of a former writ of execution issued within that time, and also to warrant his receiving the damages without a writ of execution, the weight of prior authorities being against the decision of *Heath*, J., in *Tipping* v. *Johnson*." So in *Lush's* Practice (4), "An authority to prosecute an action, according to the old cases, continues in force until the object thereof has been realized, or, as it may be technically expressed, until the record is completed, that is, not only till judgment has been obtained, but until that judgment has been satisfied." Again (5), "In one case (*Tipping* v. *Johnson*) it was held that the authority of an attorney determined with the judgment, and that execution issued by a different attorney, without an order for change, was not irregular. This decision, which is the only one on the point, proceeds, it is conceived, upon a misapprehension of the cases on which it appears to have been founded, and though not expressly overruled, it has been disapproved of."

[BOWEN, L.J., referred to sect. 37 of the *Common Law Procedure Act*, 1854, which provides for giving notice of appeal to the opposite party "or his attorney."]

Here the amount due has been ascertained; the order has not been personally served; the Defendant has made no payment into Court, nor has he paid the balance of costs. Under such

(1) Law Rep. 2 Ex. 109.
(2) 2 B. & P. 357.
(3) 15 M. & W. 88, 96.
(4) Ed. 1865, vol. i. p. 251.
(5) Ed. 1865, vol. i. p. 252.

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circumstances, according to Lord *Coke*, the duty of the Plaintiff's solicitor continues, and according to *Rolle*, C.J., the duty of the Defendant's solicitor continues. *Browning* v. *Sabin* (1) appears conclusive.

[COTTON, L.J.:—The order for payment into Court was probably an interlocutory order, in which case it could not be contended that the authority of the solicitor had determined.]

If the proceeding is a new action, a new record in a different Court, there must be a new authority to the solicitor; but by Order LVIII., rule 1, an appeal is by way of rehearing, and is not in the nature of a new action. Under Order LXXII., rule 2, where no other provision is made by the rules, the existing practice continues, and the old practice was to serve the solicitor. The only rule as to service of notice of appeal is Order LVIII., rule 2, and unless it be held that this requires personal service, which can hardly have been intended, the old practice must continue.

COTTON, L.J.:—

Mr. *Russell* has carefully gone through the authorities, and they do not decide the question, whether the authority of a solicitor on the record continues, as between him and the other side, during the period through which the right of appeal exists. In the present case, however, I think it clear that, the fruits of the judgment not having been obtained by the Plaintiff, there still was a duty imposed on the Defendant's solicitor on the record as between himself and his client, so far as the client had not discharged him, and also as regards the other side, so as to make service upon him good service. The neglecting to change a solicitor when he ceases to act does not discharge him. *Rolle*, C.J., lays down in *Lawrence* v. *Harrison* (2) a principle on which we may act. He says, "The only question is, whether the warrant of attorney be determined by the judgment given in the suit wherein he was retained; and I conceive it is not, for the suit is not determined, for the attorney after the judgment is to be called to say why there should not execution be made out against his client, and he is trusted to defend his client as far as he can from the execution." According

(1) 5 Ch. D. 511.

(2) Sty. 426.

to that principle, until the judgment has been worked out, there is a duty imposed on the solicitor on the record to defend his client against any improper steps taken for the purpose of enforcing the judgment. Until that time, therefore, the solicitor on the record must be taken, as between him and the opposite party, to represent the client, unless the client not only discharges him but substitutes another solicitor on the record. Therefore, without deciding whether the representation continues so long as the right of appeal exists, we hold that in the present case the Defendant's solicitors on the record did continue to represent him, and that the service was good.

BOWEN, L.J. :—

I agree that this case comes within the principle laid down in *Lawrence* v. *Harrison* (1). It is curious that the question whether the solicitor on the record continues to represent his client so long as the right of appeal exists has not been provided for by general order. It is not necessary in the present case to decide that point. I agree that, taking together what was said by Lord *Coke* (2) and by *Rolle*, C.J., in *Lawrence* v. *Harrison*, and looking at the facts of this case, we ought to hold that the Defendant's solicitors on the record continued to represent him at the time of the service of this notice, and that the service on them was good service.

FRY, L.J. :—

I think that this case ought to be decided on the ground taken by *Rolle*, C.J. I give no opinion on the question whether the authority of the solicitor on the record continues as long as the right of appeal exists.

Solicitors : *Martineau & Reid.*

(1) Sty. 426.

(2) 2 Inst. 378.

H. C. J.

C. A.
1885
March 16, 17, 24.

In re ROWNSON.
FIELD *v.* WHITE.

[1883 R. 442.]

Administration—Devastavit—Retainer—Statute of Frauds.

An executor or administrator would commit a *devastavit* who paid a debt to a creditor who is prevented from enforcing it by the *Statute of Frauds*. And for the same reason an executor or administrator cannot retain such debt if due to himself.

A father in consideration of the marriage of his daughter made a verbal promise to pay his daughter and her husband £500. He died intestate without performing his promise, and the daughter took out administration to his estate:—

Held (affirming the decision of *Kay*, J.), that the administratrix could not retain the debt out of the assets.

THE question in this case arose in the administration of the estate of *Joseph Rownson*.

On the 23rd of September, 1847, *Thomas White* married *Marion*, the daughter of *Joseph Rownson*, and *Thomas White* and his wife alleged that upon the treaty for the marriage *Rownson* verbally promised and agreed in consideration of the intended marriage to pay them the sum of £500. They also stated that after the marriage *Rownson* admitted the promise to *White*, and gave him two bills of exchange drawn by the firm of *Rownson & Drew* upon the *Maesteg Iron Company*, which was being wound up in bankruptcy, but that nothing had been received on the bills.

Rownson died in August, 1870, intestate, and letters of administration of his estate were granted to *Marion White*. She now claimed to retain the sum of £500, together with £472 for interest, out of *Rownson's* assets.

When the cause came on for further consideration Mr. Justice *Kay* held that the promise to pay £500 was within the 4th section of the *Statute of Frauds* (29 Car. 2, c. 3), and could not be enforced, and that the delivery of the bills of exchange did not amount to a part performance, and refused the claim for a right of retainer.

From this decision the Defendants, Mr. and Mrs. *White*, appealed.

W. Pearson, Q.C., and *Oswald*, for the Appellants:—

The fact of the promise by the intestate is proved by the evidence of Mr. *White*, and is sufficiently corroborated by the evidence of his wife: *In re Finch* (1). Mr. Justice *Kay* did not decide against us on this point, but he held that the promise was within the 4th section of the *Statute of Frauds*, and could not be enforced. We contend that this was an erroneous view of the law. The statute does not make the contract void, but only bars the remedy: *Britain* v. *Rossiter* (2). It is similar to a debt which is barred by the *Statute of Limitations*. And it has been well established that an executor or administrator may pay a debt which is barred by the *Statute of Limitations* if due to a stranger, or may retain it if due to himself: *Williams* on Executors (3); *Norton* v. *Frecker* (4); *Sharman* v. *Rudd* (5); *Stahlschmidt* v. *Lett* (6); *Hill* v. *Walker* (7); *Coombs* v. *Coombs* (8); *Prince* v. *Rowson* (9).

[BOWEN, L.J., referred to *Shallcross* v. *Wright* (10).]

There is no direct authority in our favour with respect to a debt barred by the *Statute of Frauds*, but there is no authority against us, and there is no difference in principle between such a debt and one barred by the *Statute of Limitations*. The debt is a good one *in foro conscientiæ*, and an executor would not be committing a *devastavit* in paying it. We also rely on the delivery of the bills of exchange to *White* as a part performance of the parol promise.

Hastings, Q.C., and *F. C. Norton*, for the Plaintiffs, who were next of kin of the intestate:—

There is no sufficient evidence of the verbal promise by the intestate. The oath of Mr. *White* is not sufficient in itself, and his wife's testimony is no corroboration: *Manning* v. *Purcell* (11); *In re Finch*. The delivery of the bills to *White* could not amount

(1) 23 Ch. D. 267.
(2) 11 Q. B. D. 123.
(3) 8th Ed., pp. 1053, 1810.
(4) 1 Atk. 524.
(5) 4 Jur. (N.S.) 527.
(6) 1 Sm. & Giff. 415.
(7) 4 K. & J. 166.
(8) Law Rep. 1 P. & M. 288.
(9) 1 Mod. 208.
(10) 12 Beav. 558.
(11) 7 D. M. & G. 55.

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to part performance. They were overdue bills which were practically worthless, and had no connection with the alleged promise. But whatever proof there is of the verbal promise it is within the 4th section of the *Statute of Frauds*, and could not be enforced. If it had been due to a stranger the administratrix would have committed a *devastavit* in paying it, and for the same reason she could not retain it herself. It is admitted that there is no authority for the claim of the administratrix, but it is contended that the debt is analogous to a debt barred by the *Statute of Limitations*. But the right of an executor to pay or retain a debt barred by the *Statute of Limitations* is an exception to the general rule and ought not to be extended. An executor may not pay a debt which was incurred *pro turpi causâ: Winchcombe* v. *Bishop of Winchester* (1); *Robinson* v. *Gee* (2); or for gaming: *Manning* v. *Purcell* (3). In the case of a debt barred by the *Statute of Limitations* there is originally a good debt which may be enforced, and the Courts have been reluctant to prevent the executor from paying such a debt. In the present case there never was a debt which could be enforced: *Shewen* v. *Vanderhorst* (4); *Burke* v. *Jones* (5).

[BOWEN, L.J., referred to *Lavery* v. *Turley* (6)].

It is the duty of the executor or administrator to protect the estate of the deceased against claims which cannot be enforced. He is not to determine what debts are equitable and what are not. Here the administratrix is claiming to be judge in her own cause.

Oswald, in reply.

March 24. COTTON, L.J.:—

This was an appeal of the Defendant, who was the administratrix of the intestate in the case, from an order made by Mr. Justice *Kay*.

The administratrix claimed a sum of £500, and interest to a certain date, and she claimed to retain it on this ground, that previous to her marriage her father, the intestate, had promised her husband to give her £500 as her portion in consideration of

(1) Hobart, 167.
(2) 1 Ves. Sen. 251.
(3) 7 D. M. & G. 55.
(4) 2 Russ. & My. 75.
(5) 2 V. & B. 275.
(6) 30 L. J. (Ex.). 49.

the marriage, and that the promise had never been in any way satisfied; and, therefore, after the death of the intestate, she, having taken out administration, claimed to retain the £500 and interest.

I assume, for the purpose of my judgment, that there was evidence which would establish as a fact that such an agreement was made. I assume that only for the purpose of my judgment, for the promise was made a very great number of years ago, and the evidence as to what then took place, and as to what subsequently took place, is not very satisfactory, and would require a very great deal of examination if we had to determine the fact whether such an agreement was made or not.

Now, this is an agreement which is subject to the restrictions of the 4th section of the *Statute of Frauds*. That section provides that after the date therein mentioned no actions shall be brought to charge a debt upon any agreement made upon consideration of marriage unless it is evidenced by writing. Here, there was no writing at all; there was a mere parol agreement, and no action could be maintained upon that. Can the administratrix retain in respect of such an agreement? The duty of the administratrix is undoubtedly to get all the personal estate she can, and not to pay any claims made against the estate unless they are those which may properly be paid. If she pays unnecessarily then she is guilty of a *devastavit*. The right of retainer originated in this way. It is stated in Mr. Justice *Williams'* book on Executors, and, I think, accurately stated, that as any creditor could sue an administrator or executor, and could get priority by means of a judgment on his claim, if one enforceable at law, except as against any creditors of superior degree, it was unreasonable that an administrator who, by taking out administration, became unable to sue himself, should lose the possibility of obtaining priority, and therefore he was allowed, if he had a claim, to retain. But no action could be maintained on such a promise as is alleged in this case, although it is clear that under the section of the statute the promise is not made void, for it is only enacted that no action can be maintained upon it. It is difficult to see how an executor or administrator can retain a debt on which if vested in another person no action could be maintained. But it has been held that

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an executor or administrator can retain a debt although it is barred by the *Statute of Limitations*, and it is said if an executor or administrator may retain a debt against which there is a good defence under the *Statute of Limitations*, why should he not retain a debt where there is nothing which makes the contract void, but the statute only prevents an action being brought upon it, just as the *Statute of Limitations*, if pleaded, would prevent an action being successfully brought? It has been held that an executor or administrator is not bound as against a creditor who has a claim that is barred by the *Statute of Limitations* to plead the statute. If he thinks fit he may pay a debt, although it were proved that the *Statute of Limitations* would afford a good defence, but it has never been held that an executor is at liberty to pay a claim under a contract which is by parol and within the 4th section of the *Statute of Frauds*. It is said that if we follow logically the analogy of cases on the *Statute of Limitations* we ought to come to the conclusion that as an administrator or an executor may retain a claim barred by the *Statute of Limitations*, so he may one on which, under the 4th section of the *Statute of Frauds*, no action could be brought. If we were to hold that the liberty given to an administrator or executor not to plead the *Statute of Limitations*, and, consequently, the right to retain a statute-barred claim which he himself possessed, was really an instance of a general principle, it would follow that in this case there ought also to be a right of retainer. But in my opinion we ought not to come to such a conclusion. It is quite uncertain what the origin was of allowing an executor to pay a debt against which he had a good defence under the *Statute of Limitations*, it being the duty of an executor or administrator not to pay claims he is not bound to pay; that is, he is not unnecessarily to diminish the estate which comes to his hands by paying a claim to which he has a defence. We know that there are some people, both Judges and other persons, who think that to plead the *Statute of Limitations* is unconscionable, and in my opinion we must look upon that liberty which has been conceded to an executor not to plead the *Statute of Limitations*, or, if he has a statute-barred claim of his own, to retain it, not as a principle applicable to other similar cases, but as an exception from the general rule, admitted on the ground

of the dislike which is entertained by many people to the plea of the *Statute of Limitations*.

In my opinion as there is no case where such liberty has been given except where the *Statute of Limitations* would be the defence we ought not to extend the liberty to other cases, but to consider the liberty allowed as to statute-barred debts as an exceptional instance in which executors are allowed to depart from what otherwise would be their duty. I certainly am not inclined to extend it to other cases where there is a defence to a claim of a similar nature to that under the *Statute of Limitations*, namely one which does not destroy the claim but only prevents an action being successfully brought in respect of it.

In my opinion, therefore, without going into the evidence, the administratrix was not entitled to retain this amount of £500 and interest. I think the appeal must fail on this point.

BOWEN, L.J.:—

I am of the same opinion. The duty of executors or administrators is, after paying the funeral expenses and collecting the assets, to pay the just debts and to satisfy just claims against a testator's estate. But it is clearly his duty not to waste an estate not his own, which he is administering for the benefit of others, in satisfying demands that are equally untenable in law and in equity.

However, it has been said that there is an exception to this duty with respect to claims barred by the *Statute of Limitations*. Since the time, at all events, of Lord *Hardwicke* it has been said, with a passing dissent on the part of an eminent Common Law Judge in *M'Culloch* v. *Dawes* (1), and now it is established law, both in Courts of Equity and Law, that no executor is compellable to take advantage of the *Statute of Limitations* against debts otherwise justly owing.

We have been asked to extend that qualification of the general rule to the case of a contract or agreement which is void, or rather which cannot be enforced as falling within the 4th section of the *Statute of Frauds*. It seems to me that although we are bound by

(1) 9 D. & R. 40, 43.

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a current of authority with regard to the *Statute of Limitations* we should not be justified in extending that exception further than the authorities have gone. There is to my mind this difference also between a case under the *Statute of Limitations* and a case under the 4th section of the *Statute of Frauds*. The *Statute of Limitations* does not destroy the debt but only the remedy, and it has been held that an executor may waive that defence in the case of a debt which existed and which appears to be well founded. But a parol contract within the *Statute of Frauds*, though not void to all intents and purposes, but capable of being dealt with for certain purposes as a valid agreement, is incapable nevertheless of being enforced in an action either directly or indirectly. And if you have a contract which is not capable of being enforced either at law or in equity, I fail to see that a contract of that sort creates a debt or liability against the estate of a testator.

It seems to me it would be going further than the cases have yet gone to say that a debt which the executors can recognise is created against a testator's estate when there is only a parol agreement invalidated by the 4th section of the *Statute of Frauds*. If the executor would not be justified in satisfying such a claim preferred by others it seems to me to follow on the principle on which the doctrine of retainer is founded that the executor could not retain for his own benefit.

FRY, L.J. :—

The right of the administratrix to retain in this case appears to me to depend upon the question whether or not it is a *devastavit* in an executor to pay a debt which by reason of the provisions of the 4th section of the *Statute of Frauds* could not be enforced.

Now the general rule with regard to the duty of an executor has been laid down long ago. It is stated in *Comyns'* Digest that it is a *devastavit* if an executor or an administrator pay that which need not be paid. That I conceive to be the general rule of law on the point, but on that general rule an exception has undoubtedly been grafted in the case of a debt not enforceable by reason of the *Statute of Limitations*. It has been long established that an executor is not bound to plead that statute, and that he is not guilty of a *devastavit* if he do not plead it.

Is that an exception that should not be extended, or is it an illustration of some such general principle as this: that an executor may at the expense of the estate pay a debt due on an oral contract but which debt is incapable of being enforced either at law or in equity? Now, if it be an illustration of a general principle of that sort we should certainly find other illustrations of it, but although there must be, as it seems to me, many cases of debts due on existing contracts which would have been paid but for their being incapable of being enforced at law, no other case can be found, so far as the diligence of counsel or the investigations by the Bench can discover, as to a general right in an executor to pay anything more than he is bound to pay. That appears to me very cogent evidence to shew that the case of the *Statute of Limitations* is an anomaly—a single exception and is not to be extended. No case has been found upon the *Statute of Frauds* though numbers of cases must have occurred in the hundreds or thousands of estates administered under the Court of Chancery.

I think therefore that this attempt to extend the exception fails, and we must hold that to pay a debt which is not enforceable by reason of the *Statute of Frauds* would be a *devastavit*, and consequently that the administratrix has no right to retain.

Solicitors: *Rhodes & Co.; Norton, Rose & Co.*

M. W.

C. A.
1884
Nov. 19, 20, 22, 24, 25, 27, 29;
Dec. 1, 2, 4, 8.
1885
Mar. 18, 21;
May 14.

BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN.

[1881 B. 5077.]

Patent—Utility—Specification—Sufficiency—Ambiguity — Chemical Process—Isomeric Substances—Costs—Plaintiff successful in some Issues and not in others—15 & 16 *Vict. c.* 83, *s.* 43 [*Revised Ed. Statutes, vol. xi., p.* 485]—*Certificate as to Validity.*

Two isomeric forms of a chemical product *N.*, called *A. N.* and *B. N.*, were known to exist at the date of Plaintiffs' patent, but one only was known in commerce, the other being only mentioned in scientific books. *B. N.* had only been known for a few years, before which time, and to some extent afterwards, *A. N.* had been known as *N.* The Plaintiffs' specification, which was from its nature addressed to advanced students of organic chemistry, mentioned *N.* as an important factor in his process, without stating whether it was *A. N.* or *B. N.*

Held, by the Court of Appeal (*dissentiente Baggallay*, L.J.), that the specification was insufficient for ambiguity.

When the specification of a patent for a chemical process applies equally to several isomeric substances, but one only would produce a useful result, and it can only be ascertained by experiment which that is, the patent is invalid.

Observations on the necessity of proof by the Plaintiff that the invention has been worked, when the utility of the invention and the sufficiency of the specification are in issue.

A patentee failed in establishing the validity of his patent, but succeeded on the issue of infringement:—

Held, that the Plaintiff must pay the general costs of the action, but that the Defendant must pay the costs occasioned by the issue of infringement, the one set of costs to be set off against the other.

A certificate under 15 & 16 Vict. c. 83, s. 43, that the validity of a patent came in question in the action cannot be obtained by the Defendant in an action for infringement.

THIS was an appeal from a judgment of Mr. Justice *Pearson* (1).

The action was brought by the Plaintiffs, who were the owners of a patent for "Improvements in the production of colouring matters suitable for dyeing and printing," for an injunction to restrain the Defendants from infringing their patent by making similar compounds according to the processes described in the patent.

(1) 24 Ch. D. 156.

The patent was dated the 25th of February, 1878, and was granted to *John Henry Johnson*, on a communication from abroad from *Heinrich Caro*, of *Mannheim* in *Germany*.

The complete specification, which was filed on the 23rd of August, 1878, contained the following statements:—

"This invention consists in the production of red and brown colouring matters, which in chemical language may be termed the 'sulpho-acids of oxyazo-naphthaline' and the following processes may be employed for their preparation.

"First process. Naphthylamine is converted into its diazo compound by the action of nitrous acid, and in a manner well known to chemists, and equal molecules of the diazo compound thus obtained, and of naphthol or naphthylic alcohol, are allowed to react upon one another, by preference in an alkaline solution.

"According to the employment of either of the two isomeric modifications of naphthylic alcohol known as alpha-naphthol and beta-naphthol, the result of this operation is a precipitate containing either of the two corresponding and isomeric modifications of oxyazo-naphthaline, and which may be termed 'Alpha and Beta-oxyazo-naphthaline' respectively.—These azo compounds are further converted into their sulpho-acids by any method now in use for the preparation of organic sulpho-acids, such as for instance by heating them with fuming sulphuric acid. The excess of sulphuric acid may then be removed by any of the known means for effecting this purpose, and the colouring matter may be obtained in a solid state by precipitation or evaporation.

"In this manner, brown colouring matters are obtained from alpha-oxyazo-naphthaline, and red colouring matters from beta-oxyazo-naphthaline.

"As an example of the manner in which this first process may be carried out, I proceed as follows:—About ten pounds of naphthylamine are mixed with or dissolved in about two gallons of concentrated or strong muriatic acid and about 100 gallons of cold water, and thereto an aqueous solution of nitrite of sodium is added containing about 4·8 (four and eight tenths) pounds of pure nitrite of sodium, or as much as will be found necessary to convert the naphthylamine into its diazo compound or into hydrochlorate of diazo-naphthaline. The solution thus obtained is added

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to an aqueous and strongly alkaline solution of about ten pounds of either of the two isomeric naphthols, or of mixtures of the same, when a dark red or brown precipitate will be produced consisting of oxyazo-naphthaline, which is to be filtered, washed and dried. In order to obtain the sulpho-acids of oxyazo-naphthaline I dissolve about ten pounds of the oxyazo-naphthaline in about twenty pounds of fuming sulphuric acid containing about eighty per cent. of anhydrous sulphuric acid, and the mixture is heated at a temperature of about 100° centigrade for about two hours, or until a sample of the mixture will be found to produce a solution with water. The further treatment consists in removing the free sulphuric acid contained in the mixture by any of the known means for effecting this purpose, such as for instance by neutralization with caustic lime, and the colouring matter may be obtained in a solid state, by preference in the state of a sodium salt in a manner well understood by chemists.

"Second process. Naphthylamine is converted into its diazo-compound as before stated, and equal molecules of the diazo-compound thus obtained and of the sulpho-acids of either alpha-naphthol or beta-naphthol are allowed to react upon each other, by preference in an alkaline solution. In this instance, red colouring matters are the result of the operation and may be obtained in a solid state by precipitation or evaporation.

"The above said sulpho-acids of either alpha-naphthol or beta-naphthol are produced as is well known by heating napthol with excess of sulphuric acid at a temperature of about 100° centigrade. The resulting product is a mixture of several naphthol sulpho-acids, and as my process may be applied not only to the mono-sulpho-acids of naphthol contained in that mixture, but also to the other sulpho-acids which result from the treatment of naphthol with sulphuric acid ; I wish it to be understood that what I consider as my invention under this second process for preparing the sulpho-acids of oxyazo-naphthaline, is the action of diazo-naphthaline upon all sulpho-acids of either alpha- or beta-napthol and substantially in the manner aforesaid. . . . .

"Third process. The sulpho-acids of naphthylamine are converted into their respective diazo compounds, and equal molecules of the diazo compounds thus obtained, and of either alpha-naphthol

or beta-naphthol, are allowed to react upon each other, by preference in an alkaline solution, and substantially in the manner above described in the first and second processes. In this instance alpha-naphthol produces brown colouring matters, whilst red colouring matters result from the employment of beta-naphthol.

"As is well known the said sulpho-acids of naphthylamine may be produced in various ways, such as for instance by the direct action of sulphuric acid upon naphthylamine, or in a less direct manner by treating nitro naphthaline with sulphite of ammonium, or by submitting the sulpho-acids of nitro naphthaline to the action of reducing agents. By the said methods, as is well known, several modifications of the sulpho-acids of naphthylamine are obtained, chiefly differing from each other by their various degrees of solubility in water, some of them being nearly insoluble, such as the so-called naphthionic acid.

"As an example of the manner in which the sulpho-acids of naphthylamine may be prepared from the sulpho-acids of nitro naphthaline I proceed as follows:—One part by weight of nitro naphthaline is mixed with about two parts by weight of rectified sulphuric acid, and with about one part by weight of fuming sulphuric acid, containing about eighty per cent. of anhydrous sulphuric acid and the mixture is treated at a temperature of about 100° centigrade until the conversion into the sulpho-acids of nitro naphthaline is perfect, or until a sample of the mixture produces a clear solution with an excess of caustic alkali. The result of this operation is then mixed with about ten parts of water and treated with reducing agents, such as metallic iron, and in a manner well known, in order to obtain the sulpho-acids of naphthylamine, which may be further purified in the following manner. . . .

"As as example of the manner in which the sulpho-acids of naphthylamine may be prepared by the direct action of sulphuric acid upon naphthylamine I proceed as follows:

"One part by weight of naphthylamine is mixed with about three parts by weight of fuming sulphuric acid containing about eighty per cent. of anhydrous sulphuric acid, and the mixture is heated at a temperature of about seventy to eighty degrees centigrade until a sample of the mixture produces a clear solution with an

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excess of caustic alkali. The result of this operation is then mixed with about twenty parts of water, when the difficultly soluble sulpho-acids will become precipitated and may be separated from the easily soluble modifications by filtration or otherwise. All these modifications of the sulpho-acids of naphthylamine may be converted into the corresponding sulpho-acids of oxyazo-naphthaline in the manner above described, and thus colours obtained differing in a similar ratio in their various degrees of solubility.

"Fourth process. The sulpho-acids of naphthylamine are converted into their respective diazo compounds, and equal molecules of the diazo compounds thus obtained, and of any of the various sulpho-acids of either alpha-naphthol or of beta-naphthol, are allowed to react upon each other, by preference in an alkaline solution, and substantially in the manner described in the foregoing processes. In this instance the sulpho-acids of oxyazo-naphthaline thus produced are red colouring matters.

"This invention further consists in the production of similar colouring matters, and which may be termed 'The sulpho-acids of dioxyazo-naphthaline' by substituting dioxy-naphthaline or the diatomic naphthylic alcohol for either of the two isomeric naphthols in any of the before-mentioned processes.

"Having now described and particularly ascertained the nature of the said invention, and the manner in which the same is or may be used, or carried into effect, I would observe in conclusion that what I consider to be novel and original, and therefore claim as the invention secured to me by the hereinbefore in part recited letters patent is—

"First. The production of red and brown colouring matters, which in chemical language may be termed the sulpho-acids of oxyazo-naphthaline by the action of the diazo compounds, which may be prepared from naphthylamine or from the sulpho-acids of naphthylamine upon any of the isomeric naphthols or of mixtures of the same, or upon any of the sulpho-acids, which may be prepared from either alpha-naphthol or from beta-naphthol or from mixtures of the same, substantially by the processes above described.

"Secondly. The production of similar colouring matters, and which in chemical language may be termed the sulpho-acids of

dioxyazo-naphthaline, by substituting dioxy-naphthaline for either of the two isomeric napthols in any of the processes above described for the preparation of the sulpho-acids of oxyazo-naphthaline substantially as hereinbefore described."

The Defendants by their defence pleaded that the patent was void; and that if it was valid, the Defendants had used a secret process in manufacturing his dyes which differed entirely from any process described by the Plaintiffs in their specification, and that therefore there had been no infringement of the patent.

At the trial numerous witnesses were examined, and Mr. Justice *Pearson* directed certain experiments to be made by an independent expert, Professor *Roscoe*. After his report had been made the argument was renewed, and eventually the Defendants consented to disclose their secret process in private. The hearing of the evidence and arguments was then continued *in camerâ*, the reporters and the public being excluded, after which the Court reserved judgment.

On the 27th of June, 1883, Mr. Justice *Pearson* gave judgment, and held that the patent was valid and that the Defendants had infringed it, and granted a perpetual injunction.

From this judgment the Defendants appealed.

The arguments lasted several days, and were very technical. They are fully considered in the judgments of the Lords Justices. It will be sufficient here to state the general purport of them.

Higgins, Q.C., and *Chadwyck Healey*, for the Appellants:—

The specification is ambiguous and insufficient. It does not state whether alpha-naphthylamine or beta-naphthylamine is to be used. Both of these isomers were known to chemists at the date of the patent, though alpha was the usual form. A reader, however skilful, would be in doubt which to use; they produce different results, and one of them, beta, would not produce the required dye: *Wegmann* v. *Corcoran* (1). The processes stated in the specification are too vague and indefinite. No person, although well versed in chemistry, could carry out the processes

(1) 13 Ch. D. 65.

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without making a great many experiments. Some of the processes are misleading, and if followed would be ineffectual and probably dangerous: *Turner* v. *Winter* (1); *Savory* v. *Price* (2); *Simpson* v. *Holliday* (3). There is no novelty in the Plaintiffs' invention. They take two well-known chemical substances, and claim every way of combining them, and the examples which they give will not work. We also deny the utility of the patent. The Plaintiffs have not proved any actual manufacture or sale of any dye. Until the Defendants by their own experiments discovered how the process could be carried out, no dyes were manufactured.

The Defendants have not infringed the Plaintiffs' patent. Their process differs materially from those of the Plaintiffs: *Household Coal and Iron Company* v. *Neilson* (4); *Unwin* v. *Heath* (5).

Aston, Q.C., *Webster*, Q.C., and *Lawson*, for the Plaintiffs:—

There is novelty in our invention. There are three stages in the manufacture: first, the preliminary stage, which is not included in our patent; secondly, the new combination of known chemical compounds, which is new; and thirdly, the finishing process, which is new: *Galloway* v. *Bleaden* (6).

With respect to its utility, it may be true that the dye was not made in large quantities; it may be true that it could not be made successfully in large quantities without some further improvements; but our patent was a great step in advance; the Plaintiffs discovered the combination and shewed some ways in which it may be worked. That is sufficient: it is not necessary to shew actual user: *Hinks* v. *Safety Lighting Company* (7); *Otto* v. *Linford* (8); *Neilson* v. *Harford* (9). The Defendants may get a patent themselves for their improvements, if any, but ours is not on that account invalid. We deny that the processes and examples as stated in the specification were insufficient or misleading. The weight of the scientific evidence, and the experiments of Professor

(1) 1 Webs. Pat. Cas. 77.
(2) Ibid. 83.
(3) Law Rep. 1 H. L. 315.
(4) 1 Webs. Pat. Cas. 673, 685.
(5) 5 H. L. C. 505.
(6) 1 Webs. Pat. Cas. 521.
(7) 4 Ch. D. 607.
(8) 46 L. T. (N.S.) 35.
(9) 1 Webs. Pat. Cas. 295.

Roscoe, are decisive in our favour: *Beard* v. *Egerton* (1); *Jupe* v. *Pratt* (2).

With regard to the two isomers, alpha- and beta-naphthylamine, alpha only was known to chemists at the date of the patent. Beta was described in some scientific books, but if you went into a shop to buy naphthylamine you always got alpha, therefore the specification must be taken to refer to alpha.

There has been a clear infringement by the Defendants. They have used the same materials and followed substantially the same process, and have obtained the same results.

Higgins, in reply.

1885. March 18. BAGGALLAY, L.J.:—

I much regret that there is a difference of opinion between the other members of the Court and myself upon the subject of this appeal. Under these circumstances I cannot but entertain some doubt as to the accuracy of my own views, and I should have preferred to do no more than express my inability to adopt the views taken by my colleagues, but, having regard to the possibility of the case being carried further, I feel that the parties are entitled to have not only an expression of my opinion, but a statement of the considerations upon which that opinion is based.

Two questions are involved in the appeal, the one whether the patent of the 25th of February, 1878, is a valid patent; the other, whether assuming it to be valid the Defendants have infringed it. The validity of the patent is impeached by the Defendants on the following grounds:—1. That the specification is insufficient. 2. That the invention is not new. 3. That it is not of public utility. The general character of the Plaintiffs' invention is indicated by the title of the patent, "Improvements in the production of colouring matters suitable for dyeing and printing," and it is further described in the first paragraph of the specification in the following terms: "This invention consists in the production of red and brown colouring matters, which in chemical language may be termed the sulpho-acids of oxyazo-naphthaline." The specification proceeds to describe four several processes by

(1) 3 C. B. 97; 8 C. B. 165. (2) 1 Webs. Pat. Cas. 144.

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which it is alleged by the patentees these sulpho-acids may be produced. The sufficiency of the description of each of these four processes is impeached by the Defendants. The charge against the Defendants of infringement is confined to the third process. Each of the four processes involves the combination of two substances well known at the date of the patent, naphthylamine and naphthol, or of derivatives from them. Of these derivatives I shall have occasion to speak more fully when considering the several processes, for the present it is sufficient to say that it is contended by the Plaintiffs, though disputed by the Defendants, that they were all obtainable at the date of the patent by means then well known to chemists, and that those means are sufficiently indicated in the specification. Naphthylamine and naphthol are themselves derivatives from naphthaline, which is a bye product produced in the manufacture of coal gas. By the distillation of coal certain oily matters are evoked as well as the gas used for ordinary lighting purposes, and there is left as a residuum the well-known substance coke. Of these oily matters benzene (or benzol as it is sometimes called, and more particularly so by foreign chemists) and naphthaline are constituents, both are hydrocarbons of the aromatic group, differing only in the proportions in which they are composed of carbon and hydrogen; in benzene these proportions are equal, six atoms of each, in naphthaline the proportions are ten atoms of carbon and eight of hydrogen.

Benzene and naphthaline are in so many respects similarly affected by chemical treatment, and the production of colouring matters from benzene derivatives has been so much relied upon by the Defendants in support of their contention that the Plaintiffs' patent is void for want of novelty, that I propose to trace to a slight extent the analogy between the two hydrocarbons and their corresponding derivatives. Aniline is the derivative of benzene corresponding to naphthylamine as a derivative from naphthaline, both are termed amido derivatives, and are obtained from benzene and naphthaline respectively by eliminating one atom of hydrogen and replacing it by amidogen, the combining residuum of ammonium, consisting of one atom of nitrogen and two of hydrogen. So also phenol, which is the oxide of benzene, and naphthol, the oxide of naphthaline, are formed by the introduc-

tion into benzene and naphthaline respectively of one atom of oxygen. It is as well to mention here that until a comparatively recent period the word "phenol" was used to indicate the oxide of any substance of the aromatic group, including what is now more accurately called "naphthol;" this accounts for some instances in the course of the examination of the witnesses in which the word "phenol" has been used when the reference has been to naphthol. Though benzene and naphthaline are neither bases nor acids, their amido derivatives aniline and naphthylamine are bases, and either of them will readily oxidise into acids and form salts.

Now, for many years previously to the date of the Plaintiffs' patent various colouring matters of great brilliancy and beauty, and more or less suitable for dyeing purposes, had been obtained by the action of different oxidising agents on aniline, amongst others the well-known mauve or purple dye, commonly known as the "Aniline Dye," had been discovered as early as 1856; the process was simple, aniline which contained the element of nitrogen was dissolved in sulphuric acid; bichromate of potash, an oxidising agent, was added, and the resulting precipitate when filtered and purified gave the colouring matter.

It can occasion no surprise that after this discovery scientific chemists should direct their attention to others of the hydrocarbons and their derivatives in the hope of discovering modes of preparing colouring matters as valuable as those derived from the hydrocarbons of the benzene series. About the same time that the aniline dye became known an important discovery was made by Dr. *Griess*, one of the witnesses in this case; though its full value was not appreciated until after the lapse of many years. His discovery was this: that by exposing the amido derivatives of benzene and other hydrocarbons of the benzene series to the action of nitrous acids the atoms (one of nitrogen and two of hydrogen) which had been introduced in order to obtain the amido form could be replaced by a double element of nitrogen. By treating aniline in this way a substance was obtained to which the name of diazo compound of aniline was given, a term which explains itself, and the product of similar conversions of other amido derivatives were in like manner called diazo compounds of such derivatives.

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That Dr. *Griess's* discovery had opened a way for further discoveries in connection with the preparation of colouring matters was generally recognised; he and other chemists continued their experiments but with no adequate success. As early as 1864 he had combined diazo compounds of the benzene series with the phenols, and had produced dyes of more or less value, but he did not discover until some years later to what important reactions his discoveries might lead, and he has stated in his evidence that though a diazo compound of naphthylamine had, before the date of the Plaintiffs' patent been combined with a phenol properly so called, the reaction between a diazo compound of naphthylamine and a naphthol was not known.

Mr. *Chadwyck Healey* in his very skilful cross-examination of Dr. *Griess* endeavoured to obtain from him an admission that with such a knowledge as was possessed of the reactions of analogous substances a knowledge of the reaction between a diazo compound of naphthylamine and naphthol would soon follow, but the attempt failed. Dr. *Griess* in reply said, "I distinctly state that by the combination of diazo benzol and phenol, dye was obtained in 1864, and that if I had been a little cleverer, analogy would have induced me to prepare this very dye which is now under consideration. But analogy did not lead me to do that; analogy does not go a long way in chemistry."

The evidence of Dr. *Griess* to which I have just alluded was to my mind a complete answer to the objections raised by the Defendants to the Plaintiffs' patent on the ground of want of novelty in the invention. Such objection was in substance based upon the well-known processes for obtaining colouring matters from derivatives of the benzene series, and a suggested analogy between such processes and those described in the specification. How little a knowledge of the effect of a reaction between the benzene derivatives would assist in developing the effect of a reaction between the substances referred to in the specification is well illustrated by the fact that though the effect of the former reactions was known to chemists as early as 1864, the effect of the reaction between two naphthaline derivatives was not made generally known until the date of the Plaintiffs' patent, and was presumably not discovered much earlier.

In approaching a consideration of the four processes described in the specification I may at the outset state that I entirely assent to the views expressed by Mr. Justice *Pearson* at the commencement of his judgment, that unless the specification shews practically how the sulpho-acids of oxyazo-naphthaline are to be obtained the patent is not a valid patent.

Accepting the expression "sulpho-acids of oxyazo-naphthaline" as a general description in chemical language of the products of each of the four several processes described in the specification, the name imports the combination of sulphur, nitrogen and oxygen with naphthaline; but though each of the four processes is composed of successive stages by which the several elements of sulphur, nitrogen and oxygen are introduced into the ultimate product, they are not introduced in the same order: thus we have in process I., first, the conversion of naphthylamine into its diazo compound, introducing the additional element of nitrogen; secondly, the combination of the diazo compound with the oxidising agent naphthol; and thirdly, the sulphonation of the result of this combination, or the production of its sulpho-acids.

This is the simplest, so far as description is concerned, of the four processes: naphthylamine is converted into its diazo compound by the method of Dr. *Griess* in the first stage; the combination in the second stage produces the substance oxyazo-naphthaline; and in the third stage the sulpho-acids of that substance are obtained.

In process II. the first stage is the same as in process I., the conversion of naphthylamine into its diazo compound; the second consists in the sulphonation of the naphthol; and the third in the combination of the results of stages one and two. In process III. we have first the sulphonation of the naphthylamine, the result being converted in the second stage into its diazo compound, and in the third the combination of this diazo compound with naphthol. And in process IV. the first and second stages are as in process III., in the third stage the naphthol is sulphonated as in the second stage of process II., and in the fourth stage the results of the second and third stages are combined. Thus, whilst in process I. the naphthaline derivatives are combined previously to the sulphonation, in processes II. and III., the sulphur is

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introduced into one or other of the derivatives, and in process IV. into both, before they are combined.

Directions are also given in the specification as to the mode of effecting the several reactions, as to the removal of excess of sulphuric acid after sulphonation, and as to other incidental steps, to which it is unnecessary at present to further advert.

I pass on now to a consideration of the objections which have been raised to the specification, and the objection to which I shall first address myself is one which affects each and every one of the four processes: it may be formulated as follows:—

That there being at the date of the patent two known isomeric forms of naphthylamine, distinguished as alpha-naphthylamine and beta-naphthylamine, the specification does not state whether the word "naphthylamine," as used in it, is intended to include beta-naphthylamine as well as alpha-naphthylamine, or to indicate alpha-naphthylamine only. The objection as thus stated has a very formidable appearance. At the date of the patent chemists had succeeded in producing two amido derivatives of naphthaline, to which the names of alpha-naphthylamine and beta-naphthylamine had been given; they were isomeric, that is to say, they were identical in their chemical composition, but, like other isomeric substances, to a greater or less extent different in their chemical and physical qualities. Alpha-naphthylamine had been discovered some twelve or fifteen years before the date of the patent, and had become an article of commerce, though the dealings in it in this country had not been to any great extent. Beta-naphthylamine had been discovered in the early part of 1875, but, with the exception of the temperature at which it would melt, its chemical and physical properties, and in what respects they differed from those of alpha-naphthylamine, had not been ascertained. I shall, however, have occasion to refer to this subject more particularly presently.

The objection which I am now considering had not been raised by the statement of defence, nor was it included in the particulars of objections, except so far as it may be considered as covered by the general allegations in the Defendants' pleadings, that the specification did not sufficiently describe the manner in which the invention was to be performed. So far as I can learn from

the notes supplied to us of the proceedings before Mr. Justice *Pearson*, it was suggested during the cross-examination of Professor *Dewar*, the first scientific witness called on behalf of the Plaintiffs. In support of the objection it was not only contended that the patentees, or those on whose behalf and for whose benefit the patent was obtained, must be assumed to have been well aware of the existence and of the properties of beta-naphthylamine, but it was forcibly pressed upon us that the specification had been drawn in ambiguous and misleading language of set design and not *per incuriam*. Mr. *Higgins* in his argument before Mr. Justice *Pearson* is reported to have expressed himself as follows:—

"It was hoped (by the patentees) that by not specifying beta-naphthylamine, if it turned out in a course of numerous experiments that there was any considerable divergence from the specified colours in using beta-naphthylamine, it would be able to be said, 'Oh, but everybody knows that alpha-naphthylamine must have been intended—that was the only thing known in commerce,' but if, on the other hand, it turned out that chemical investigation and experiment would have fairly allowed the inclusion of beta-naphthylamine in the various processes, and made the processes equally competent for beta-naphthylamine, then it would be said 'Oh, but we have claimed the whole of naphthylamine, and at that time both kinds of naphthylamine, alpha and beta, were known, and we can point to an English text-book to shew that that was so.'"

I have quoted the language so reported to have been used by Mr. *Higgins*, as it expresses in concise and forcible terms the views which he has pressed upon us during the argument upon the present appeal. The charge is a serious one, and if the language of the specification can be fairly construed so as in the one case put to support the validity of the patent, if challenged, on the ground that the use of beta-naphthylamine would lead to failure, and in the other to protect the patentee against an infringement by the use of that substance, it would be fatal to the Plaintiffs' case in the present action whether the language had been adopted *per incuriam* or of set design. But Mr. Justice

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Pearson did not so construe the specification, he was of opinion the word "naphthylamine" meant that which was generally known as naphthylamine at the date of the patent, and that though beta-naphthylamine had been previously discovered, and had been described in certain scientific publications, it was an article prepared for laboratory purposes only, that it was a very costly article, which hardly any scientific man had ever seen, and that though properly designated beta-naphthylamine, to distinguish it from the naphthylamine which had been known for years previously, and to which the name of alpha-naphthylamine was thenceforth given, it had no real existence for any commercial purpose.

Able and exhaustive arguments have been addressed to us on behalf of the Defendants, and our attention has been directed in great detail to the evidence adduced in the case, both oral and documentary, for the purpose of inducing us to come to a conclusion upon this point different from that arrived at by Mr. Justice *Pearson*. Those arguments have prevailed with my colleagues, but, after a very careful consideration of the evidence, my views in respect of it are in entire accordance with those expressed by him.

As regards the oral testimony, there is a concurrence of opinion that beta-naphthylamine had never been known as an article of commerce. Professor *Dewar* having stated in the course of his examination in 1883, five years after the date of the patent, that as he understood it, the language of the specification referred to ordinary naphthylamine, was asked in cross-examination, "What is ordinary naphthylamine?" and having replied, "Alpha-naphthylamine," he was further asked to give his definition of ordinary naphthylamine, and replied as follows:—

"The ordinary naphthylamine is the one which is met with in commerce, and which is a marketable commodity. The beta-naphthylamine until quite recently was a body which could only be prepared at very great expense, and with a great amount of complication."

Again, in answer to the Judge, who put the following questions: "Suppose I went into a shop where these products are sold and asked for naphthylamine, what would be the answer to

me?" Professor *Dewar* said, "You would simply get ordinary alpha-naphthylamine—they would not ask you what you wanted."

Dr. *Griess* also, in answer to a question by the Judge, said:—

"Beta-naphthylamine was known long before the patent was taken out, but only as a specimen, in fact, I have never seen it in my life, and there are very few chemists in existence who had ever seen the compound previously to the taking out of the patent."

And, in the course of his cross-examination by Mr. *Chadwyck Healey*, Dr. *Griess* further said:—

"There were two (naphthylamines) known before the date of the patent, one was the beta-naphthylamine, which I distinctly stated was only known to a few men in this world; I do not believe that, besides the discoverer and some other scientific chemists, any one else had seen the compound. Although I have been engaged in the study of these compounds, I have never seen it."

And being further pressed by questions as to its being described in the text-books of the time, and particularly in the 1877 edition of *Fownes'* Manual of Chemistry, he answered:—

"I do not dispute the fact; I believe it was not mentioned in much more comprehensive books, and it might be mentioned in much smaller books. I cannot say that; it just depends on whether they considered the thing worth mentioning; I am quite convinced it was a compound almost unknown to chemists."

Dr. *Armstrong* being asked whether he knew the ordinary form in which naphthylamine was sold and supplied in the market, replied:—

"It is the alpha-naphthylamine."

And being further asked whether beta-naphthylamine was to be got as easily as alpha-naphthylamine, replied:—

"In 1878 it was practicably not procurable."

In cross-examination by Mr. *Higgins*, Dr. *Armstrong* stated that alpha-naphthylamine had been known to him for at least fifteen years, that he could procure it when he wanted it, and in large quantities, but that in 1878 beta-naphthylamine could only be procured by a special order from certain chemists, who would procure it "from such persons as *Kalbaum* of *Berlin*, who lay themselves out to make everything," and that any person so

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ordering would have to wait a long time for it. And the same witness, Dr. *Armstrong*, having stated, in answer to Mr. *Higgins*, that according to his reading of the specification, it did not include beta-naphthylamine, was further asked "Why not?" and replied:—

"Simply because naphthylamine even now, in 1883, to me means alpha-naphthylamine, and more particularly so in 1878, when no easy method of preparing it had been discovered."

Dr. *Odling*, also, in the course of his evidence, stated that the naphthylamine which we should now call alpha-naphthylamine was a commercial article well known at the date of the patent, and was the substance referred to by the patentee.

I shall have occasion to refer more particularly to this portion of Dr. *Odling's* evidence when considering the effect of the documentary evidence on the questions now under consideration.

The views expressed by the four gentlemen to whom I have referred, than whom no more competent witnesses on questions involving the details of chemical science and practice could have been produced, is in no respect contradicted or weakened by the testimony of the scientific witnesses called on behalf of the Defendants.

Mr. *Ivan Levinstein*, one of the Defendants, and evidently a gentleman of much intelligence, and possessed of considerable chemical knowledge, stated, in the course of his evidence, that he had known alpha-naphthylamine for about ten years, and beta-naphthylamine since 1876, and that he did not know any place in *England* where either species was sold, and that he would have to get either one or the other from abroad.

This evidence, as indicating that both the naphthylamines were preparations of little or no value beyond the laboratory, may have some bearing upon the contention of the Defendants, that the Plaintiffs' invention was of no public utility, but upon the questions which we are now considering it is in no respect opposed to, and is to some extent confirmatory of, the evidence given by the Plaintiffs' witnesses.

Dr. *Alder Wright*, also a distinguished chemist, was called as a witness for the Defendants; his examination in chief, so far as it turned upon the questions under consideration, was very carefully

conducted. Having stated that he knew the two substances alpha- and beta-naphthylamine, and that they were both known at the date of the patent, he was asked: "Would any chemist or practical workman know by reading this specification to which the process applied," and answered that "neither a chemist nor a workman would be able to say which was meant." Mr. *Higgins* then dropped the subject, apparently thinking that he could not better his position, and proceeded to question his witness as to the several processes described in the specification. But on Dr. *Alder Wright* being asked in cross-examination whether the cost of beta-naphthylamine at the date of the patent was more or less than the cost of beta-naphthol, replied: "I do not think that at the date of the patent any attempt was made to manufacture it out of the laboratory; therefore there were no means of ascertaining what it would cost on a large scale." No statement made by any witness called on behalf of the Plaintiffs was more conclusive than this, that beta-naphthylamine was at the date of the patent an article prepared for laboratory purposes only.

The examination of Dr. *Carnelley*, another scientific witness called on behalf of the Defendants, was confined to the subject of the several processes described in the specification, and to certain experiments made by them illustrative of them.

So far, then, as the oral testimony is concerned, the views expressed by Mr. Justice *Pearson* are, in my opinion, fully supported. Does the documentary evidence suggest any different view?

In the course of the argument our attention has been particularly directed to certain articles in a German scientific publication, *Berichte der Deutschen Chemischen Gesellschaft*, concisely referred to as the *Berichte*, which contains notices of discoveries and experiments in connection with the science of organic chemistry, as also to extracts from an English publication called the *Chemical News*, and held in high repute amongst persons interested in the science. Certain of these articles were referred to in the particulars of objection delivered on behalf of the Defendants with their statement of defence as indicating that the invention of the Plaintiffs was published within the realm previously to the date of the patent. It is not in dispute that in the libraries of the *British Museum*, the *Great Seal Patent Office*, and

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the *Chemical Society*, the articles in the *Berichte* were accessible to the public. Printed copies of these articles and extracts, those in the *Berichte* being in German with English translations appended, have been admitted by agreement, and with the other documentary evidence have been referred to as "the literature." Throughout the arguments before Mr. Justice *Pearson* it was assumed that the discovery of beta-naphthylamine had been made in 1876, but during the arguments on the appeal other articles in the *Berichte* dated in 1875 and 1876 were produced and admitted, and from them it appears that beta-naphthylamine had been discovered as early as the spring of 1875, and had been described by *Lieberman* of *Berlin*, its discoverer, in the German chemical publications of the time.

Now though the term "the literature" has been conveniently applied to the documentary evidence admitted in the present case, it is clear that publications of this nature must be regarded as of two classes, those addressed to the scientific world and those addressed to working or practical men, a distinction which cannot, in my opinion, be more simply and clearly illustrated than it was by Dr. *Odling*, who being asked by Mr. Justice *Pearson* when the body now known as alpha-naphthylamine, but formerly known as naphthylamine without any prefix, first acquired its present name, replied as follows:—"My Lord, there are two distinct forms of literature upon the subject. There is the systematic scientific literature and there is the technical literature, and in the technical literature it is called naphthylamine up to the present day, but in the more scientific literature you may find the distinction, although it is very rare." The distinction between the information given by scientific literature and that given by technical literature is one very important to be borne in mind when we are dealing with questions such as that now under consideration; publications having reference to chemical science and intelligibly expressed will always be inquired after and studied in their laboratories by scientific chemists, ever on the alert to make themselves acquainted with the newest compounds with the view of putting them to some useful purpose, but speaking generally it is not the fact that such publications are sought after and studied by practical working chemists, whose

labours for the most part commence after the useful purpose has been ascertained. I have carefully read and considered all the publications which have been put in evidence in this action, including those admitted during the arguments on the appeal, and I do not find in them anything to lead to or to suggest the conclusion that they were addressed to others than scientific chemists. It is true that in the last admitted articles from the *Berichte* there are recorded under August and December, 1875, and March, 1876, the results of certain experiments on the then recently discovered beta-naphthylamine with the view of ascertaining its properties, and that in those articles the two forms of naphthylamine are referred to and to some extent contrasted, but in the other admitted articles dealing with the derivatives of naphthyline and later in date, I can find no reference to beta-naphthylamine, though there are references to naphthylamine without any prefix in cases in which it is clear from the context that alpha-naphthylamine is intended. As, for instance, at page 12, l. 70, of the printed literature, we find in an article dated August, 1877, the following reference to naphthionic acid: "Naphthionic acid prepared from naphthylamine and sulphuric acid:" the well-known author of the article, *Blowstrand,* not deeming it necessary to use the prefix "alpha."

And so, again, in an article by *Hoffman* under date 1877, on a new red dye stuff, it is stated (at p. 15) that azo-naphthylamine, sulpho-acid, and phenol, might have been the materials employed in producing it. In the same article reference is made to the isomeric naphthols alpha and beta, which had been discovered some years and were commercially known. This distinction in a publication of the highest scientific class, between the use of the prefixes "alpha" and "beta," when referring to the commercially known and distinguished isomeric naphthols and the omission to use the prefix "alpha" when referring to that isomeric form of naphthylamine, is, to my mind, important as shewing that it was not the practice of scientific chemists to use the prefix "alpha" when referring to that which was recognised by them and has been spoken of by so many witnesses as the ordinary naphthylamine.

In the agreed extracts from the *Chemical News,* there are no

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references to beta-naphthylamine, but at p. 20, l. 65, reference is made to *Hoffman's* red dye stuff and to his above mentioned suggestions as to the materials used, the azo-naphthylamine sulphoacids being named without any prefix.

Reliance has also been placed by the Defendants upon the notices of naphthylamine in Mr. *Fownes'* Manual. In the 11th edition of that work, published, I think in 1873, ten years after the discovery of naphthylamine, the only notice of it is to the effect that naphthaline treated with nitric acid would yield nitronaphthaline, and that the product could be converted by reducing agents into amido-naphthaline, or naphthylamine, and this is the mode by which to this day alpha-naphthylamine, the naphthylamine of commerce, is practically produced. In the 12th edition, edited, as the former was, by the eminent chemist Mr. *Henry Watts*, whose recent death is a public loss, after stating that alpha-naphthylamine was obtained by the reduction of nitronaphthaline in the mode described in the 11th edition, certain of its properties, derivatives, and reactions are noticed, the knowledge of which had doubtless been obtained by experiment since the earlier edition. But the account of beta-naphthylamine is limited to a description of the modes of obtaining it (which is essentially different from that of obtaining alpha-naphthylamine) with the sole addition of the temperature at which it melts, and the information so afforded was all that was then, or at the date of the patent, known of beta-naphthylamine. So far as the notice in *Fownes'* Manual of that isomeric form of naphthylamine is concerned, there is nothing to suggest that it was other than, and much to suggest that it was, a mere laboratory base, as was the case with very numerous other substances referred to in that very valuable work.

The comments to which I have already referred of Dr. *Griess* upon the notices to be found in the text-books of beta-napthylamine and other similar substances, are in my opinion well founded, and aptly illustrate the distinction so well drawn by Dr. *Odling* between the scientific literature and the technical literature of chemistry.

Such are the grounds, explained, perhaps, in too great detail,

upon which I have arrived at the conclusion that the objection raised by the Defendants to the specification, for want of any distinct reference to beta-naphthylamine, is not well founded.

Two other objections have been raised to the general scope of the specification, to which I must shortly allude; they are based upon the terms in which the claim is expressed, which, omitting words immaterial to the present purpose, are to the following effect:—"What I consider to be novel and original, and therefore claim as the invention secured to me by the letters patent, is the production of red and brown colouring matters by the action of the diazo compounds prepared from naphthylamine or its sulpho-acids, upon either alpha- or beta-naphthol, or its sulpho-acids, or from mixtures of the same." It will be observed that there is no claim for the mode of preparing either the diazo compounds or the sulpho-acids, and it has been urged that the specification is insufficient and misleading, inasmuch as it treats the modes of preparing these substances as well known to chemists, whilst such well-known modes as are given by way of example are insufficient for the several purposes indicated. Of this objection I shall have occasion to say more when considering the details of the processes themselves.

It has been urged that the claim is too wide, as claiming not only all sulpho-acids then known of naphthylamine and naphthol, but all which might be discovered at any future time. As regards this objection, I deem it unnecessary to say more than that I entirely agree with the views expressed by Mr. Justice *Pearson* in the course of his judgment, that the specification must be construed as having reference to such acids only as were known at the date of the patent.

It remains for me to consider the objections raised by the Defendants to the several processes described in the specification. Process I. concisely stated consists in combining equal molecules of a diazo compound of naphthylamine and naphthol, and in converting the result of this combination into its sulpho-acids. No substantial objection has been or well could be taken to the first stage of the process; the mode of converting naphthylamine into its diazo compound was well known; the two isomeric forms of naphthol were also well known, and no one who has attempted it

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has found any difficulty in effecting the described combination. To the products of this combination the name has been given as already mentioned of oxyazo-naphthaline, and they are further distinguished as alpha-oxyazo-naphthaline and beta-oxyazo-naphthaline according as alpha- or beta-naphthol is used in the combination.

The substantial objection raised to process I. is to the conversion of the oxyazo-naphthaline produced by the combination into its sulpho-acids. The mode of effecting the conversion is described in the specification in the following terms:—"These azo compounds are further converted into their sulpho-acids, by any method now in use for the preparation of organic sulpho-acids, such as for instance by heating them with fuming sulphuric acid." And an example is added of the way in which these sulpho-acids are obtained by the patentee, viz., by the use of fuming sulphuric acid containing about 80 per cent. of anhydrous sulphuric acid, the mixture being heated to a temperature of about 100° centigrade for about two hours, or until a sample of the mixture will be found to produce a solution with water.

If this stage of the process is practicable the description of it is simple enough. Now, without entering into the details of the objections raised, it is sufficient to say that they amount to these, that if the process thus indicated were adopted the materials would be, if not burnt and destroyed by the action of the sulphuric acid, at least charred and damaged to such an extent as to render the product useless; and further, that the operations could not be carried out without serious risk to the persons engaged in it. Upon these points there was a great conflict of evidence, witnesses of well-known reputation as chemists were called on both sides, who deposed to their having carried out or tried to carry out the process as described in the specifications; those who were called on behalf of the Plaintiffs found the process neither destructive of the materials used nor attended with danger or risk to the operators, and they have stated in clear and explicit terms that they had no difficulty in obtaining the specified results; they further stated that the descriptions given in the specifications are sufficient to enable a competent workman accustomed to manufacture

dyes and to conduct chemical operations to produce the desired results, and that any such workman would well understand the proper mode of using the sulphuric acid so as to avoid the suggested destruction of materials and risk of injury to himself and others.

The experience of the Defendants' witnesses as detailed by them was to the contrary effect. An observation made by Mr. *Aston* was not in my opinion without force, it was to the effect that one set of witnesses did their best to carry out successfully the operations described in the specification, whilst the others did not desire success, but rather courted failure. Having to deal with this conflict of evidence, Mr. Justice *Pearson* adopted a course which it was fully within his jurisdiction to adopt, and which, in my opinion, he wisely adopted, though I feel bound to add that the balance of the evidence adduced before him appears to me to have been in favour of the Plaintiffs' view. An order was made that Mr., now Sir *Henry Roscoe*, one of the most competent chemists in this or any other country, should pursue the first process as described in the specification and should report the result to the Judge. Sir *Henry Roscoe* acted upon the order, and his report under date of the 18th of May, 1883, is in evidence. From this it appears that having prepared oxyazo-naphthaline in the manner described in the specifications, he proceeded to sulphonate it by the use successively of fuming sulphuric acid containing 30 per cent., 10 per cent., and 80 per cent. of anhydrous sulphuric acid. His experiment with the 80 per cent. of anhydrous acid, which was the strength of the acid mentioned in the specification, was described by him in the following terms:—"I now proceeded to try the process exactly as given in the example to which reference has already been made with a sulphuric acid containing 80 per cent. of sulphuric anhydride. I did not find it either dangerous or impossible to follow the directions as there given, and I carried on the experiment as follows:—I dissolved the oxyazo-naphthaline in sulphuric acid containing 80 per cent. of anhydride in the proportion of 10 lbs. of the first and 20 lbs. of the latter. The mixture was then heated to a temperature of about 100 centigrade for forty minutes, when a sample was found to be completely soluble in water. The

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time needed to carry out the mixture of oxyazo-naphthaline yielded by one pound of naphthylamine with the 80 per cent. acid in the above experiment was about two hours and a half. I then proceeded with the treatment as described in experiment A. The weight of dry sodium salt thus obtained was 3 lbs. 1 oz., or about 306 per cent. on the weight of naphthylamine used." The treatment above referred to, as described in experiment A, was so described by Sir *H. Roscoe* in the following terms: "I removed the free sulphuric acid contained in the mixture by neutralization with caustic lime, and converted the lime salt thus obtained into the corresponding sodium salt by double decomposition with bicarbonate of soda." In my opinion the first process, as illustrated by the example given in the specification, was exactly followed by Sir *Henry Roscoe*. The opinion of that eminent chemist as to the result of the experiments performed by him was expressed in the following terms:—

"I am of opinion that the above dyeing trials shew that the colour prepared with the acid containing 80 per cent. of anhydride is distinctly superior both in tinctorial power and in brilliancy to that prepared with acid containing 30 per cent. of anhydride, and that this again is distinctly superior both in tinctorial power and in brilliancy to that prepared with the acid containing 10 per cent. of anhydride, and, therefore, I conclude from the above experiment that, both as regards quantity and quality of dye, the process involving the use of 80 per cent. acid is superior to the others. I am also of opinion that this process can be carried on without danger, provided proper appliances are made use of."

The report of Sir *Henry Roscoe* satisfied Mr. Justice *Pearson*, as it satisfies me, that the first process described in the specification shews a practical mode of producing sulpho-acids of oxyazo-naphthaline which give a distinct colour. The attempts made in the arguments before Mr. Justice *Pearson*, as well as in those before us, to lessen the value of Sir *Henry Roscoe's* experiments and report were in my opinion futile, and I cannot but regret that they were made.

The character of the objections raised on behalf of the Defendants to the specification so far as it described the first of the four

processes, the evidence by which it was attempted to support these objections, and the crushing effect produced upon them by Sir *Henry Roscoe's* experiments and report, ought not to be, and in my opinion cannot be, disregarded when attention is given to the objections raised in respect of the other processes.

Upon the subject of process II. I have but few observations to make. I have carefully examined the several passages in the evidence to which our attention was directed by Mr. *Higgins*, both in his opening of the appeal and in his reply. Professor *Dewar* and Drs. *Griess* and *Armstrong* having severally stated that they had tried process II. in accordance with the directions contained in the specification, and that it gave the result indicated in the specification, were cross-examined by Mr. *Higgins* and Mr. *Chadwyck Healey* for the purpose, apparently, of shewing that there was a want of certainty as to the colour obtained. Dr. *Griess*, who had experimented with both naphthols, said: "I got in one instance, using the beta-naphthol, a deep dark red, and in the other instance I got a reddish brown or brownish red," a view which was practically confirmed by the Defendant *Ivan Levinstein*, who said: "I got different shades of colouring matter, reddish brown and browns, or what I call browns."

I agree with Professor *Dewar's* observation that it is often a matter of opinion whether a thing is red or brown. Mr. Justice *Pearson* came to the conclusion that the colours produced by the use of process II. were substantially the same as those described in the specification, though they varied in shade, but in shade only. In this view I certainly agree, and am of opinion that process II. is sufficiently described in the specification.

Before proceeding to a consideration of process III., I may observe that I do not propose to say more of process IV. than that it must stand or fall by the decision as to process III. The objections raised to the description of process III. contained in the specification, and the charge that the process has been infringed by the Defendants, give rise to so many considerations common to both that I propose to deal with them, to some extent at least, together.

The substances which are the subject of combination in process III. are a diazo compound prepared from the sulpho-acids of

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naphthylamine and naphthol. The preparation stage of this process consists of two steps, the procuring by purchase, manufacture, or otherwise of sulpho-acids of naphthylamine and the conversion of such sulpho-acids into the diazo compounds. No claim is made by the specification in respect either of the production of the sulpho-acids or of their conversion; the modes of producing the acids and of effecting their conversion are treated as well known; as regards the former it is stated to be well known that the sulpho-acids of naphthylamine may be produced in various ways, and three ways of producing them are instanced:

1. By the direct action of sulphuric acid on naphthylamine.
2. By treating nitro-naphthaline with sulphite of ammonium.
3. By the reduction of the sulpho-acids of nitro-naphthaline.

Now these three ways of obtaining sulpho-acids of naphthylamine are all referred to in an article "On the Sulpho-acids of Naphthylamine" by *Schmidt* and *Schaal* in the "*Berichte*" under date August, 1874. No. 1 is the method adopted by the two chemists, *Schmidt* and *Schaal*, in the experiments described by them. No. 2 is referred to in the same article as the method by which *Piria* obtained the acids designated by him as naphthionic and thia-naphthionic acids. And No. 3 is also referred to as the method adopted by *Laurent* in the production of an acid stated by him to be identical with naphthionic acid. In the opinion of *Schmidt* and *Schaal*, as expressed in the article to which I am referring, their experiments established the identity of the sulpho-acids obtained by them which they styled "true sulpho-acids" with naphthionic acid. Having mentioned the three ways of producing the sulpho-acids, the specification proceeds in the following terms:—

"By the said methods, as is well known, several modifications of the sulpho-acids of naphthylamine are obtained, chiefly differing from each other by their various degrees of solubility in water, some of them being nearly insoluble, as the so-called napthionic acid."

This statement is in accordance with the notice taken by *Schmidt* and *Schaal* of the isomeric forms of sulpho-acids of naphthylamine, produced not only by their own process, but by that

of *Laurent*, both of which appear to have had a greater solubility than the naphthionic acid. Examples are next given in the specification of the manner in which the sulpho-acids might be prepared by the ways or methods numbered 1 and 3, and the description of process III. is concluded in the following terms :—

"All these modifications of the sulpho-acids of naphthylamine may be converted into the corresponding sulpho-acids of oxyazo-naphthaline in the manner above described" (*i.e.* by converting them into their diazo compounds and then combining them with naphthol) "and thus colours obtained differing in a similar ratio in their various degrees of solubility."

Such being the description contained in the specification of the third process it will be convenient that I should now advert shortly to the circumstances under which the action was commenced.

The Plaintiffs' provisional specification was filed on the 25th of February, 1878, and the complete specification on the 23rd of August. At a very early period after the filing of the provisional specification the Defendant *Ivan Levinstein* became aware of the Plaintiffs' invention ; when he first acquired this knowledge does not precisely appear, but probably between the dates of the filing of the two specifications as he refers to the patent being in the *Paris Exhibition* in May, 1878. The following facts also appear from the statement of defence, from the answers of the Defendant *I. Levinstein* filed on the 20th of May, 1882, to the interrogatories of the Plaintiffs, and from the evidence given by him on the trial of this action :—That in the course of the year 1878 he became acquainted with *Poirrier's* report on the colouring matters in the *Paris Exhibition* : that from that period until the end of the year 1880 he occupied himself in experimenting upon the substances referred to in the Plaintiffs' specification ; that in June, July, and November, 1880, he purchased from *Poirrier* a considerable quantity of a substance known as "Rocceline," the larger portions of which he parted with to purchasers from himself ; that at the end of the year 1880 he commenced to manufacture, according to a process which he kept secret, colouring matter to which he

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gave the name of "Rocceline," its chemical composition being alleged by him, though apparently inaccurately, to be the same as that of the "Rocceline" manufactured by *Poirrier*; and that in February, 1881, he, on account of the Defendants *Levinstein & Sons*, forwarded to Mr. *Byers* a quantity of the rocceline so manufactured by himself, and which at their request he labelled "Fast Blackley Red." The dye manufactured by the Defendant according to his secret process, and which is alleged by the Plaintiffs to be an infringement of their patent rights, has been conveniently referred to as the "Blackley Red."

In the months of March and April, 1881, specimens of the "Blackley Red" were submitted for analysis to the Plaintiffs' scientific witnesses, Professor *Dewar* and Drs. *Griess*, *Armstrong*, and *Odling*. By each of them the Blackley Red was treated with reducing agents and resolved into its proximate constituents, and these constituents were found to be sulpho-acids of naphthylamine and beta-naphthol. The fact that one of the constituents was a sulpho-acid of naphthylamine at once suggested that the Blackley Red had been prepared by the third process described in the specification. It was pointed out by Professor *Dewar* in the course of his evidence that if the Blackley Red had been prepared by any of the other processes, the sulpho group would have been found in the acid (naphthol) and not in the base (naphthylamine). Two also of the witnesses, Professor *Dewar* and Dr. *Griess* (I am not sure as to the other two), made dyes according to the Plaintiffs' third process, and subjected them to the same process of reduction as that to which they had subjected the Blackley Red, with the like resulting constituents, and all the four witnesses unhesitatingly stated it to be their opinion that the Plaintiffs' third process was substantially the process by which the Blackley Red had been manufactured.

The views thus taken and expressed by the Plaintiffs' witnesses were remarkably confirmed by the answer of the Defendant *Ivan Levinstein* to the 13th interrogatory. In his answer, filed on the 20th of May, 1882, he had declined to answer the 13th interrogatory on the ground that by answering it he would disclose his secret process, but by an order made on the 5th of December,

1882, his objection was overruled, and he was required to answer. In obedience to this order he, on the 16th of January, 1883, filed his answer in the following terms:—

"In the manufacture of all the three dyes referred to in the interrogatory I combine a diazo compound prepared from a sulpho-acid of alpha-naphthylamine with beta-naphthol."

The three dyes referred to in the interrogatory included the "Blackley Red."

The trial of the action before Mr. Justice *Pearson* occupied many days. Apart from the question of infringement the Plaintiffs had to meet the objections raised by the Defendants to the sufficiency of the specification in respect of process III.; these objections had reference to the directions given for the preparation of the sulpho-acids of naphthylamine and for the conversion of such acids into their diazo compounds.

On the other hand, the Defendants, whilst admitting that the Blackley Red was obtained by a combination of a diazo compound of the sulpho-acids of naphthylamine with beta-naphthol, defended themselves against the charge of infringement by alleging that the Defendant *I. Levinstein* made his own sulpho-acids of naphthylamine but did not prepare them by either of the processes mentioned in the specification, and further that he did not convert his sulpho-acids into their diazo compounds in the way referred to in the specification.

A defence of this nature could not be successfully maintained without a disclosure of the secret process of the Defendant *I. Levinstein*, and it was disclosed during the progress of the trial under the following circumstances. The witnesses on both sides had been examined, counsel had made their speeches, and at the conclusion of Mr. *Aston's* reply the Judge, as I have already mentioned, sought the assistance of Sir *Henry Roscoe* in respect of process I. On the 13th day of the trial, after the report of Sir *Henry Roscoe* had been received and communicated to the parties, the Defendant *I. Levinstein*, who had up to this time declined to answer any questions, the answer to which might lead to a disclosure of his secret process, determined to adopt a different course and to state its details.

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In my opinion he was wisely advised to adopt this course, having admitted the use of the same combination as that in respect of which the Plaintiffs claimed protection, but relying upon the details of his own process being different from those of the Plaintiffs, there was a strong probability of an adverse decision if he persisted in his refusal to state what his process was, especially having regard to the circumstances under which his objections to process I. had failed.

The details of the Defendants' secret process were placed before the Court in the form of answers to questions put in chief, in cross-examination, and by the Judge.

His explanation of the way in which he prepared his sulpho-acids was to the effect following:—

"Having put a quantity of ordinary sulphuric acid into a pan I add by degrees a quantity of naphthylamine; I stir it up so as to mix it, the effect is to gradually increase the temperature of the mixture up to about 70° centigrade. When all the naphthylamine has been put in and mixed I add fire heat and increase the temperature to about 80° or 90° centigrade; the mixture is kept at this heat until all the naphthylamine is dissolved, I then raise the result to a higher temperature, exceeding 100° centigrade, until the contents of the pan are converted into crystals."

It is alleged by the Defendants that by this process one acid only is obtained (not isomeric acids as produced by the process of *Schmidt* and *Schaal*), and that this one acid is insoluble in water. In the course of his examination he summarised the advantages of his process in the following terms:—

"By the use of ordinary sulphuric acid in my process I have obtained not only the advantages of the cheapness of the common acid, and simplicity and safety in working, but the greater advantage of being able to convert the whole of the naphthylamine into one sulpho-acid."

The arguments on behalf of the Defendants, both as regards the alleged insufficiency of the specification in respect of process III., and their defence against the charge of infringement, may be conveniently classified as follows:—

1. That inasmuch as in the example given in the specification

of the manner in which sulpho-acids of naphthylamine may be prepared by the direct action of sulphuric acid, the use of fuming sulphuric acid is directed, the expression "sulphuric acid" in the earlier part of the description of the process must be construed as limited to fuming acid, and that the protection of the patent extends no further than to the use of fuming sulphuric acid.

2. That if the claim is limited to the use of the fuming acid, the process cannot be successfully carried out, the destruction of the materials used and the risk of danger to the operators being at least as great as in the case of process I.

3. That inasmuch as the Defendant *I. Levinstein* has used ordinary sulphuric acid and not fuming sulphuric acid, he has not infringed the patent rights of the Plaintiffs.

I am unable to read the specification in the way suggested by the Defendants. In my opinion the earlier reference to sulphuric acid is quite general, as it also is in the commencement of the example; as so used it includes both ordinary sulphuric acid and fuming sulphuric acid containing various proportions of anhydrous acid, and the use of ordinary sulphuric acid for the purposes of sulphonation is as much within the protection of the patent as is the use of fuming sulphuric acid. Moreover, the use of ordinary sulphuric acid in the manner described by the Defendant *I. Levinstein* in his account of his secret process, is a well-known equivalent for the use of fuming acid in the way pointed out in the specification. It is in my opinion clear from the evidence of all the scientific witnesses, that it was well known at the date of the patent that the sulphuric acids of naphthylamine and of other aromatic hydrocarbon bases, could be formed by the direct action upon such bases of either ordinary or fuming sulphuric acid, and that if ordinary acid was used its want of strength could be compensated for by increased heat. It may be that the method adopted by the Defendant *I. Levinstein* for the preparation of his sulpho-acids leads to a result more satisfactory in some respects than that of the patentee, as to which I do not express any opinion, but at the most it can only be regarded as an improvement in the mode of preparing sulpho-acids of naphthylamine by an equivalent well known at the date of the patent for the method indicated by the specification. As such, in

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my opinion, it would be an infringement within the principles enunciated in *Unwin* v. *Heath* (1), even if it could be held to be a reasonable construction of the specification that the process only described the use of fuming acid.

In the view which I take of the construction of the specification it is unnecessary to express any opinion upon the point raised on behalf of the Plaintiffs, that the preparation of the sulpho-acids formed no part of the Plaintiffs' invention. With respect to the suggested injury to materials used and danger to the operators arising from the carrying out of process III. in accordance with the directions in the specification, I agree with Mr. Justice *Pearson* in thinking that the objections so raised are untenable, and, substantially for the reasons assigned by him, that with ordinary care chemists properly instructed for the discharge of the duties with which they are intrusted, would as easily, safely and effectually carry out the directions in process III. as they could those in process I., as to the danger of which the most exaggerated statements had been made, and had been proved to be utterly groundless.

I have but little to say on the contention of the Defendants that the Defendant *Ivan Levinstein* did not convert his sulpho-acids into their diazo compounds in the way referred to in the specification. In my opinion he did not merely use an equivalent for but adopted the process described in the specification. Dr. *Griess*, the discoverer of the constitution of the diazo compounds and of the mode of preparing them, has told us—and his evidence is confirmed by that of all the other scientific witnesses—that there is only one way known of making a diazo compound, viz., by the action of nitrous acid upon an aromatic amido compound, and that this may be effected by free nitrous acid or by nitrate of soda, potash, or lime. It is true that the way referred to in the specification is for the conversion of the base and not of its sulpho-acid, and the distinction between the two processes has been pressed upon us; but the scientific evidence is, to my mind, clear that the method of preparing a diazo compound described by Dr. *Griess* and known as "Dr. *Griess's* method," is applicable to all amido products, whether salts or

(1) 2 Webs. Pat. Cas. 296, 302.

bases. Much has been said about the method commonly called "*Cleve's* method" being the only method known at the date of the patent for the conversion of naphthylamine acid into a diazo compound. I presume that the object of pressing that upon us was to suggest that as the Defendant *I. Levinstein* did not adopt *Cleve's* method, he had discovered a new process. As far as I can gather from the evidence, *Cleve's* method was the only method generally known before the date of the patent; but this is not surprising; sulpho-acids of naphthylamine were then but little known; the mode of preparing them was probably less known; and *Cleve*, experimenting in his laboratory, discovered that if he suspended them in alcohol he could convert them into their diazo compounds by adopting Dr. *Griess's* method and exposing them to the fumes of nitrous acid, and this is what has been referred to as "*Cleve's* method." The specification, however, gave further information, it informed the public that sulpho-acids of naphthylamine could be converted into their diazo compounds in the same way as naphthylamine itself could be so converted, viz., by the ordinary well-known process known as Dr. *Griess's* method; and, further, that the sulpho-acids of naphthylamine could be produced by any of three well-known processes for the sulphonation of aromatic hydrocarbon derivatives. Whether the sulphonation was aided or not by the suspension in alcohol according to *Cleve's* method appears to me to be immaterial.

Passing from the preparation to the combining stage of the third process, I again agree with the opinion formed by Mr. Justice *Pearson*, and concisely but emphatically expressed by him in the following terms:—"The processes employed by Mr. *Levinstein* are simply processes which produce exactly the same results from the same materials as are produced by this patent. The same object is pursued, the same materials are employed, the same result is obtained."

In my opinion the process of the Defendant *Ivan Levinstein*, though skilfully and cleverly conceived and executed, is a clear infringement of process III.

If I am right in this view, his success shews conclusively the practicability of the process described in the specification, and more than this, the ready sale of his "Blackley Red" is conclu-

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sive evidence of the utility and commercial value of the Plaintiffs' invention.

An argument has been addressed to us on behalf of the Defendants which, though I am unable to accede to it, requires notice from me, and the more so as it has found favour with my colleagues. If I rightly appreciate it, it may be formulated in the following propositions:

1. Assuming the Defendants to have infringed the Plaintiffs' patent, in so far as they have followed the directions given in the specification, those directions, though wide enough to cover all the Defendants have done, are not in themselves sufficiently explanatory for the instruction of those classes of the public for whom they were or ought to have been intended.

2. That the Defendants by their own experiments and exertions have discovered how those inadequate directions may be and have been by them successfully carried out.

3. That without the assistance derived from the Defendants' discovery, the Plaintiffs' invention was and would continue to be useless.

As at present advised I am not prepared to admit that even if these propositions were supported by the evidence they would be sufficient to justify the infringement, or to protect the Defendants from the consequences. But let us see upon what the Defendants rely to support these propositions.

It has been urged that though the Plaintiffs described three methods by which several modifications of the sulpho-acids of naphthylamine might be obtained, the Defendant *I. Levinstein* had discovered that naphthionic acid was the proper acid to use, and that it was the only sulpho-acid of naphthylamine of which a diazo compound could be obtained, and further that the use by the Defendants of naphthionic acid in the preparation of their "Blackley Red" became known to the Plaintiffs' scientific witnesses through the reduction of the "Blackley Red" sent to them for analysis, and that by the aid of the knowledge so acquired by them they were enabled to successfully carry out the Plaintiffs' third process, and that but for such assistance the process would have been unworkable by them. A ready answer, as it appears to me, to this contention is, that naphthionic acid is

mentioned in the specification as a sulpho-acid by the treatment of which the desired result could be obtained. The Defendant *I. Levinstein* was one of the class of persons to whom a specification such as the one under consideration must be deemed to have been addressed, the experiments which it is suggested led him to discover the peculiar value of naphthionic acid would doubtless have led any other chemist engaged in like work to ascertain for himself how best to carry out the Plaintiffs' process in accordance with the directions in the specification, or how best to coast round it (to use the expression of one of his witnesses) so as to avoid an infringement. In my opinion the evidence does not warrant the assumption that the Plaintiffs' scientific witnesses were guided to success in their attempts to carry out the Plaintiffs' process by discovering from their analysis of the "Blackley Red" that naphthionic acid was the proper sulpho-acid to use, though that analysis led them, as I have already mentioned, to the conclusion that it was the third process that had been infringed.

It has been further argued that naphthionic acid is only one of the various isomeric forms of the sulpho-acids of naphthlamine which could be produced by the methods referred to in the specification, and that it in no way appears that the other isomeric acids could be successfully used.

The subject of isomerism is one comparatively new in the science of chemistry, and is very recondite; it is at present by no means fully developed, or indeed clearly understood to the extent to which it has been developed, it was less developed and less understood seven years ago at the date of the patent. As regards the isomeric forms of the sulpho-acids of naphthylamine, not only is it argued, and apparently with reason, that the productions of the different known methods of sulphonating naphthylamine are isomeric forms of the same chemical composition with differences of chemical and physical properties at present unknown or but partially known, but it has been suggested that by the adoption of the same process of sulphonation, isomeric forms may be found among the results of the same operations. If this be so, it has not been proved that this amount of knowledge was possessed at the date of the patent. I have endeavoured to analyse for myself

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the evidence given upon the subject of isomerism, upon the hearing of this action, by the very experienced chemists who have been examined on either side, and I have been assisted in my efforts by a study of the notices in the "*Berichte*," and other literature. The subject was interesting, I might almost say fascinating, but my attempt was a failure. The answers given by the scientific witnesses were doubtless in many instances very cautiously given, especially when under cross-examination, possibly further information might have been given had it been thought prudent by the one party or the other to attempt to obtain it; making due allowance for the natural unwillingness of a witness to volunteer testimony that might prove damaging to the case of the party on whose behalf he was called, I believe that the evidence was honestly given. Suggestions were from time to time made that specific questions were not categorically answered, but this arose from the witness knowing more of his subject than the examining counsel, who frequently put his questions in a form to which he hoped to obtain what he called a straightforward answer, but which, if so given, might have failed to give the real meaning of the witness. I am satisfied that previously to the date of the patent little, if anything, was known of the isomeric sulpho-acids of naphthylamine beyond the laboratories of scientific chemists, and the so-called scientific literature of chemistry, and my views in this respect are, I think, fully borne out by the articles in the "*Berichte*," to which I have before referred, by *Schmidt* and *Schaal*.

The specification gave to naphthionic acid, which is not even mentioned in the 1877 edition of *Fownes*, a publicity which it did not before possess.

I can only again express my regret that there should be a difference of opinion upon the subject of this appeal between myself and my colleagues, their views must, however, of course prevail, and the appeal must be allowed.

FRY, L.J., delivered the judgment of Lord Justice *Bowen* and himself, as follows:—

The Plaintiffs in this action are a German manufacturing company of which Dr. *Caro* is a principal member or officer, and they

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sue the Defendants for the infringement of letters patent granted on the 25th of February, 1878, to *Johnson*, on a communication from Dr. *Caro*.

The first claim of the specification, to which our attention has been more particularly directed, is in these words: "The production of red and brown colouring matters, which in chemical language may be termed the sulpho-acids of oxyazo-naphthaline, by the action of the diazo compounds which may be prepared from naphthylamine or from the sulpho-acids of naphthylamine, upon any of the isomeric naphthols or of mixtures of the same, or upon any of the sulpho-acids, which may be prepared from either alpha-naphthol or from beta-naphthol, or from mixtures of the same, substantially by the processes above described."

The specification describes four distinct processes which may be employed in the preparation of the brown and red colouring matters.

These four processes have been described in the evidence of Professor *Dewar* as four distinct discoveries, but they have certain elements in common. Each process consists in the bringing together of two derivatives of naphtha, one from naphthylamine, the other from naphthol; each process may be said to consist of three steps or operations: the diazo operation, the sulphonating operation, and the combination of the derivatives from the naphthylamine and the naphthol.

The four processes differ from each other in the order in which the steps are taken.

In the first process the diazo operation comes first, and naphthylamine is converted into its diazo compound by nitrous acids, and the combination operation comes next, and equal portions of the diazo compound and the naphthol are allowed to react and produce oxyazo-naphthaline, and lastly, this is sulphonated, and thereby are produced the sulpho salts of oxyazo-naphthaline.

In the second operation the diazo operation is first, the sulphonation second, and the combination last.

In the third process the sulphonation of naphthylamine comes first, then the diazo operation, and lastly the combination with naphthol.

In the fourth process the sulphonation is duplicated; the first

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step is the sulphonation of naphthylamine, the second the diazo operation, the third the sulphonation of naphthol, and the last the combination of the diazo compound of sulpho-acids of naphthylamine with the sulpho-acids of naphthol.

Not only does the specification present four distinct processes by which the end may be attained, it presents in certain places alternative paths in a given process. Thus, as we shall have occasion more especially to shew, the third presents three distinct ways for the sulphonation of naphthylamine.

Almost every point which can be taken in answer to the action for infringement of a patent has been raised in the present case. The novelty and utility of the invention have been denied, the adequacy of the specification has been impugned, and the Defendants' process has been said to be novel, and no infringement of the Plaintiffs' rights, and very numerous questions, and those of more than usual difficulty, have been discussed before us.

The novelty of the invention comprised in the letters patent may first be considered.

Dr. *Griess* had some years before discovered what has been called the diazo process, that is that from the aromatic hydrocarbons, compounds might be derived by the substitution of two atoms of nitrogen for two atoms of hydrogen, and he had, as Dr. *Hoffman* points out, proved that these diazo bodies were capable of fixing amines, amides, and phenols, and had thus indicated a method of producing an almost endless series of new bodies, some of which were of value as colouring matters, and had thus opened up a very wide and indefinite region for industrial cultivation, and this region was zealously cultivated before the Plaintiffs' patent was taken out. But the value of any particular combination of these derivatives from the hydrocarbons was not within the range of the prophetic power of science, and the combination of two derivatives from naphtha so as to produce a colouring matter had not before been made; so that it appears to us that if Dr. *Caro's* invention was for such a combination of particular bodies as led to a definite and useful result his invention was not only novel, but the good subject of a patent.

We now approach two inquiries, which in the present case are to our minds closely connected with one another: (1.) The inquiry

whether the invention possessed any utility or conferred any public benefit; (2.) The inquiry whether the specification is adequate, that is, whether, to use the words of the grant, the grantor has particularly described and ascertained the nature of his invention. The course pursued by the Plaintiffs has made the answer to these questions very difficult, for the first thing to know is what in fact was the inventor's invention, and yet the Plaintiffs have not put into the box Dr. *Caro* or any witness to prove what the real invention was, or to shew that the patent has been worked by the Plaintiffs or any one else; although Dr. *Glazer*, one of the principals connected with the Plaintiffs' works, and Dr. *Scraube*, also from the same works, both, according to Dr. *Griess*, gentlemen familiar with the manufacture of the sulpho-acids of napthylamine by the Plaintiffs, were in Court during the trial, and the Defendants invited the Plaintiffs to call some witness from their works. Furthermore, the Plaintiffs have produced no specimen of brown colouring matter at all, they have produced a specimen of red colouring matter as if from their works, but have not shewn that it has been made in accordance with the patent, nor do they prove the manufacture or sale of a single ounce of any colouring matter before the Defendants' product was in the market, nor have they shewn that any subsequent improvement in the manufacture has put their patent of 1878 out of date.

In making these observations we do not forget that Dr. *Caro* was said to have been unwell, that the Defendants' solicitors were anxious, as appears from a letter written by them, that the trial should not be delayed for his appearance, and that Mr. Justice *Pearson* refused to let in evidence tendered by the Plaintiffs at the end of the Defendants' case. But the Defendants did not in our opinion relieve the Plaintiffs from any burthen of proof. Mr. *Higgins* at the end of the Plaintiffs' case fairly called on the Plaintiffs to put into the box some of the gentlemen from the Plaintiffs' works then in Court, and Mr. Justice *Pearson* rejected the evidence tendered at the last moment, not because the Defendants had not raised the issues for which it was tendered, but because they had raised them so plainly that the evidence ought to have been brought forward earlier. The Plaintiffs have not applied to us to reverse the ruling of Mr. Justice *Pearson* on this

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point, and it appears to us that we must therefore determine the case on the evidence before us without supposing the Plaintiffs to have been capable of proving what they did not in fact prove.

The invention in question is one arising out of the application of principles of organic chemistry—a subject of great complexity. It deals with substances all of them of comparative novelty to science, and many of them not yet familiar to the ordinary chemist, and all or many of the substances dealt with exhibit the phenomena classed together under the word "Isomerism," that is to say, they are substances whose percentage, composition, or chemical constitution, so far as revealed by chemical analysis, is the same, which consist of the same number of parts of the same substances and yet differ from one another sometimes in their physical properties only, sometimes in both their chemical and physical behaviour, and are often the results of different modes of preparation. The most important of those differences for the present purpose is a difference in value as dyeing substances, so that different isomers will give different shades of colour or different colours. It appears to be the result of the evidence that the different modes of producing the same substance chemically will produce different isomers, and that the different proportions of substances employed, the differences of temperature, or of time, may all result in differences in the isomeric form, and that whilst the laws of chemical combination are so far known as that the results may in many cases be predicted so far as relates to the percentage composition of the resultant body, the laws which regulate the production of the different isomers are unknown, and consequently that the results cannot be predicted except empirically. It follows that the principle of equivalence must be applied to the construction of the specification with great care, because two processes producing the same results, so far as chemical analysis goes, may produce different isomers, and unless the same isomers be arrived at by both processes the result will be different for the purpose in hand. It further follows from what we have said, and also from the character of the specification itself, that the specification cannot be considered as addressed to any ordinary workman but rather to one of those advanced

students of organic chemistry who are usually attached to dye manufactories, and of whom Dr. *Caro*, or Dr. *Liebmann*, or the Defendant himself, may be taken as samples. To any other reader than such a chemist the specification cannot, we think, be deemed to be addressed at all. Having said this much by way of preface, we return to the inquiry what was the real invention of Dr. *Caro*, and the best conclusion which we can arrive at in the twilight produced from want of evidence on the Plaintiffs' part is that it was one or other of two things, namely, either the production of all the possible isomers of the sulpho-acid of oxyazo-naphthaline, or the production of the particular one of these isomers which has been produced by the Defendants, and is sold by them as a red dye, and which corresponds exactly with the substance which has been produced by the Plaintiffs as the red dye which they sell, although they have not shewn how or where it has been produced.

Now, if we take the first of these alternatives, and assume Dr. *Caro's* invention to have been the production of the sulpho-acid of the oxyazo-naphthaline in all its isomeric modifications, we inquire whether this invention is shewn to be of any public benefit, or whether it represents only a series of laboratory experiments due to the generalisation of Dr. *Griess* with respect to the diazo compounds of the hydrocarbons. The evidence shews that the isomers of the sulpho-acid of oxyazo-naphthaline are very numerous, and not two only, according to the use of alpha- or beta-naphthal as suggested by the specification (process I.), that they are by no means all of use as dyes either red or brown, and that, so far as is shewn, the one isomer used alike by Plaintiffs and Defendants is alone of any practical value.

The evidence in the case leads us to the conclusion that for a dye to be of any real value, its production must be certain, that is, the products must be uniform or variable only according to a law known to and capable of being used by the worker. It appears that buyers cannot judge of the colour resulting from the dye from the external appearance of the colouring matter itself, and therefore they only rely on the manufacturers, and expect to be able to get the same shade on successive purchases, and the fact that the Plaintiffs and Defendants alike appear to

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sell only one red dye and no brown dye at all, goes far to convince us that many or all of the shades or colours are useless.

The mere production in the laboratory of a varying series of red and brown colouring matters, being instances of the production of such matters from the diazo compounds which Dr. *Griess* had long before the Plaintiffs' patent pointed out as a frequent result of his process, was not, we think, an invention of any public benefit, though it might be an important step towards some useful discovery, and if this was the invention of Dr. *Caro*, we think that it had not the needful predicate of utility. But if, on the other hand, his invention was the production of the particular isomer of the sulpho-acid of oxyazo-naphthaline which is produced alike by Plaintiffs and Defendants, then we think that it was a highly valuable and useful invention. We will now assume this to be the case, and then inquire whether the specification particularly ascertains and describes the manner of producing this particular sulpho-acid of oxyazo-naphthaline.

Now how is this particular form of acid arrived at? It is produced from applying the diazo process to a sulpho-acid of naphthylamine. But again the sulpho-acid of naphthylamine has several isomeric forms, the number known at the date of the patent being, according to the Defendants, six, to which two have subsequently been added. The sulpho-acid may be produced according to the specification in no less than three ways. Of the three ways, the first referred to in the specification is that of *Schmidt* and *Schaal*, by the direct action of sulphuric acid upon naphthylamine; producing two isomers known respectively as naphthionic and thio-naphthionic acids, and apparently producing naphthionic acid in larger quantities than thio-naphthionic acid. The second way referred to in the specification, by treating nitro-naphthaline with sulphate of ammonium, was discovered by *Piria*, and produces the same isomers as the first way, but in what proportions is not shewn. The third way is by submitting the sulpho-acids of nitro-naphthaline to the action of reducing agents, and owes its discovery to *Laurent*, and gives at least two isomers, neither of which is believed by Dr. *Odling* to be naphthionic acid, a conclusion in which he seems supported by the opinion of *Schmidt* and *Schaal*. The three ways are thus chemical equiva-

lents, if we simply regard the empirical formula or percentage composition of the substance produced; but they are not chemical equivalents if we go further and consider the several isomers as separate bodies. For the three ways produce different isomeric modifications, and of these one, and one only, is used practically by Plaintiffs and Defendants alike, and this is the naphthionic acid, or, as the Defendants suggest, one particular isomer of several known under that name. Thus, without at present going further into the details of the specification, it appears to give at least six roads to a wide result, namely, the production of any of the numerous isomeric forms of the sulpho-acids of oxyazo-napthaline, and of these six roads one and one only, namely, by the first way of the third process, is shewn to have been the real and beneficial invention, and the third way of the third process is shewn by producing a different isomer of the sulpho-acid of naphthylamine not to lead to this beneficial result. There is nothing in the specification to shew any preference of one process or one way over another, all are presented to the reader as of equal value, and he is left to discover for himself which he will pursue. The safe path to follow, instead of being ascertained and pointed out, is left for discovery by means of further experiments, and we see no reason to differ from the conclusion of Mr. Justice *Pearson* when he said that the Defendant had employed great knowledge, great skill, and great perseverence in finding out the processes which they used.

But then it is suggested that the evidence of the four scientific witnesses for the Plaintiffs shews that the specification was a sufficient guide to a competent reader. We will hereafter say something about the 1st, 2nd, and 4th processes, but with regard to the 3rd process we must observe that in the case of Professor *Dewar*, Dr. *Armstrong*, and Professor *Odling*, their attention was first called to the product of the Defendants and to the examination of this product, and not till afterwards, and with the light thrown on the specification by the examination of a successful article, was their attention drawn to the terms of the specification itself. Professor *Dewar* received the Defendants' Blackley Red on the 27th of March, 1881, and subsequently experimented on the specification, and in trying the 3rd process he directed his

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attention almost exclusively to the particular form of sulpho-acid of naphthylamine in consequence of finding that that was the one successfully used by the Defendants. In like manner Dr. *Griess* not only confined his attention to the 3rd process after he found that that was the one pursued, as he considered, by the Defendants, but he actually used in his experiments the very sulpho-acid of naphthylamine procured from the analysis of the Defendants' dye, and in the trial he made of the third process before the examination of the Defendants' material he appears to have proceeded from naphthionic acid furnished to him by the Plaintiffs, probably after they knew of the Defendants' use of it. So, too, Dr. *Armstrong* received the Blackley Red from the Plaintiffs on the 14th of April, 1881, and he found by its examination the particular form of sulpho-acid used by the Defendant, that is, naphthionic acid, and subsequently used it himself, that form being in Dr. *Armstrong's* view the principal product of the second way mentioned in the 3rd process. Lastly, Dr. *Odling* received the Defendants' dye early in 1881, tried the 3rd process in the middle of 1881, and subsequently employed the sulpho-acid used by the Defendants, namely, naphthionic acid, some of which was supplied to him by the Plaintiffs, and some extracted by him from the Defendants' dye.

It is evident that these laboratory experiments, thus conducted after the Defendants' success had shewn the importance of the use of naphthionic acid, are quite inadequate to prove that a competent reader could by the specification alone have discovered without further experiment what course he ought to pursue. None of the Plaintiffs' experts appear to have followed the third way of the 3rd process. If they had they would have worked not with naphthionic acid, but with another and, for aught that appears, a useless isomer. They were kept from wandering into this third way by the light thrown on the process by the examination of the Defendants' product, and not by any note of warning on the specification itself.

But again, taking the actual material made by Plaintiffs and Defendants, as the true object of the patent, the description of the 3rd process appears to us to be misleading in another respect. Solubility in water is a well known desideratum in a dye, and

the reason, according to Professor *Dewar*, why the product of the 3rd process is superior to that of the 1st process is the greater solubility in water of the product. Now the 3rd process points out that the isomers of the sulpho-acids of naphthylamine differ from one another in point of solubility. It points out that all these isomers may be converted into the sulpho-acids of oxyazo-naphthaline, and that the colour thus obtained will differ in solubility in the same ratio as the sulpho-acids of naphthylamine from which they were prepared, and therefore as naphthionic acid is correctly stated in the specification to be nearly insoluble, the colour produced from it ought, according to the specification, to possess a comparatively low degree of solubility, and so far would be wanting in this desideratum of a colouring matter. In a word, the specification seems to us to warn the reader against the use of the nearly insoluble sulpho-acids of naphthaline, including naphthionic acid, which is the only useful one, and to recommend the use of the highly soluble forms which, so far as appears, are valueless. In this conclusion we are much confirmed by the evidence of Professor *Dewar* in re-examination, in which he, as an expert, expresses the opinion that the indications which the specification gives with regard to solubility are enough to enable the willing reader to select what isomers should be preferred for the purpose of producing a soluble colour, that is, as we read his evidence, to select the soluble, and reject the nearly insoluble isomers of the sulpho-acids of naphthylamine—a course which we now know to be fatal to success.

In another point the specification appears to us to be open to observation on the ground of ambiguity. The material with which the specification starts is naphthylamine, and prior to the date of the patent two isomers of that substance were known, the one originally discovered some twenty years ago, and the other discovered in the year 1875 by *Liebermann* and *Schriding*. The older substance, therefore, acquired the designation of alpha- and the newer of beta-naphthylamine just as naphthol had, as the specification itself shews, got to be discriminated into the isomers represented by alpha- and beta-naphthol. Now, not only did alpha- and beta-naphthylamine differ from each other in important physical qualities, but the distinction between them were analogous

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to those between alpha- and beta-naphthol. The first publication of this discovery was by a paper read at the *German Chemical Society* on the 14th of August, 1875, and published shortly after in the proceedings of that year, and an abstract of which appeared in the first volume for 1876 of the journal of the *Chemical Society* in this country. In December, 1875, and March, 1876, other papers on the same subject were read before the *Chemical Society of Germany*, and were published in the proceedings of that society, whilst abstracts of these papers appeared in the first and second volumes respectively of the journal of the *English Chemical Society* for 1876.

In Dr. *Armstrong's* little book on the hydrocarbons published in 1874, naphthylamine is not mentioned at all. In Mr. *Watts'* edition of *Fownes'* Organic Chemistry, published in 1877, the two isomers are mentioned and duly distinguished by their letters. No doubt that the older form of naphthylamine was the better known and the cheaper, but it appears to us that there was at the date of the patents every probability that the new isomer might at some time during the life of the patents become, as in fact it has already become, of commercial importance, and of use in the manufacture of dyes. No doubt that some writers may have used the expression "naphthylamine" as signifying the alpha form, after the date of the discovery; no doubt it is probable that any dealer in the article at the date of the patent would have understood by the word "naphthylamine" the older form, but we have arrived at the conclusion that any organic chemist of the class to whom the specification is addressed would have known of the existence of the two isomers, that any careful writer of such a class would have used the discriminating mark, and that any careful reader of such a class would have felt the ambiguity of the language used in the present instrument, that he would, to use Dr. *Odling's* expression, have felt that it was a question what was meant by it. The care used in discriminating between the two isomers of naphthol in the specification made its silence as to the naphthylamine, if possible, more embarrassing.

Now in our opinion an obligation rests on a patentee to use clear and unambiguous language, that duty the patentee in the present case has, we think, neglected to perform, either from

carelessness or from design. The present instance is, we think, a forcible illustration of the necessity of upholding this obligation, for as beta-naphthylamine has been found to produce yellowish tints and not to be adapted to use under the specification, the Plaintiffs contend that it is not included in the word "naphthylamine," whereas if the beta-isomer had been found useful, it would have been open to him to take the other line of argument, and to contend, as he probably would have done, that both isomers were within the scope of the specification. It is not, however, necessary for us to consider whether this ambiguity would have been fatal to the present patent if it had stood alone. We regard it as only one instance of a want of exactitude which runs through the whole specification, viz., the want of discrimination between useful and useless isomers. The patentee does not separate between the naphthylamines which are useful and useless, he does not select out of the four or six isomers of the sulpho-acids of naphthylamine which is to be used, he does indeed indicate the different actions of alpha and beta-naphthol, but in the final stage he does not indicate which of the sulpho-acids of oxyazo-naphthaline are useful and which are useless, but presents them all in gross, as if all alike were useful, or as if they were useful in proportion to their solubility, which is not the fact.

Looking, then, at the generality of language in which the patentee has described his object, as if it might include all sulpho-acids of oxyazo-naphthaline, and the fact that only one of them has been shewn to be of any public utility; looking at the very many ways which the patentee offered to the public for reaching this object, and at the want of any guidance as to which of these numerous roads was preferable; looking again at the fact that no one is shewn to have used the patent till after the Defendants had found their way to the result, and that they did so only after long and patient experiments; and looking lastly at this, that the expert witnesses of the Plaintiffs found their way through the mazes of the 3rd process after an examination of the Defendants' product, or after being furnished with naphthionic-acid by the Plaintiffs, we have come to the conclusion that though the specification contains much information, and would convey very valuable suggestions to an inquirer, it was not capable of being used without

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further experiment, and that by reason of its not differentiating the useful from the useless in its various stages it did not particularly ascertain or describe the method of arriving at a result of any public benefit or utility.

In short, the specification appears to us to have been a kind of drag net, sweeping into its wide ambit all the isomers of the sulphoacid of oxyazo-naphthaline without regard to whether they were good, bad, or indifferent, and leaving for subsequent investigation and experiment the questions which of them were useful and which were useless, and by which of the many ways included in the specification the useful modifications could be safely reached.

Even, if as we think may very probably be the case, other dyes besides the one made by the Plaintiffs and Defendants may result from the processes indicated by the Plaintiffs, we are of opinion, as the result of the evidence already referred to, that these dyes will be valuable products only when they can be made from time to time with certainty, and when the manufacturer who has pursued a given process can be certain of the result. We have come to the conclusion that he can only be thus certain when at each stage he uses the same isomers, and not when he uses processes producing a number of isomers together, and, according to our view, already expressed, the specification is inadequate without further experiment to guide any chemist to a given result as to colour through the various stages of the process.

It may be suggested that in the view which we have taken the exactitude required in the discrimination of isomers is excessive and impracticable. But it must be borne in mind that in the present case the difference between isomers makes the difference between success and failure, and is therefore of the essence of the invention, nor can it be forgotten that under the same empiric formula numbers of isomeric forms are sometimes grouped, differing from one another most widely, for the purposes of the arts, and that every isomer is capable of being discriminated from every other by a reference to its name where nomenclature has so far advanced, and when that is not the case by a reference to its differentia, whatever that may be.

We have hitherto considered mainly the construction of the 3rd process. But the description of the 2nd process appears to

us to be vitiated by the same want of care in discriminating between isomers which affect the description of the 3rd process. This 2nd process appears to claim as within its scope all the sulpho-acids of either alpha- or beta-naphthol. Now we conclude from the evidence that this class included at the date of the patent at least a mono-sulpho-acid with two isomeric forms, a di-sulpho-acid with two isomeric forms, and a tri-sulpho-acid in one form; that new forms have since the date of the patents been discovered, and that all these several forms have different values in the production of colouring matters, the mono-sulpho-acids inclining towards yellow, and the tri-sulpho-acids tending towards blue; and taking the whole evidence on this point it shews to us that the results of the 2nd process are in consequence of a mixed and uncertain character. Lastly, as to the 4th process, there is, we think, no satisfactory evidence that it produces any good and valuable result. We conclude, therefore, that the Plaintiffs are in a dilemma; if Dr. *Caro's* real invention was the production of all the isomers of the sulpho-acid of oxyazo-naphthaline it was of no public benefit; if it was the production of the particular isomers used by the Plaintiffs and the Defendants the specification did not particularly ascertain and describe the nature of the invention.

We have hitherto spoken as though the specification were confined to one claim—in fact it comprised a second—for the production of red and brown colouring matters, which might be termed the sulpho-acids of dioxyazo-naphthaline by substituting dioxy-naphthaline for either of the two isomeric naphthols in any processes before described for the preparation of the sulpho-acids of oxyazo-naphthaline. No evidence appears to have been given as to the utility of any of these products, and no colouring matter has been shewn to be produced by the processes referred to in the second claim, and it appears to us evident that this duplication of the claim tends greatly to increase the confusion in which an unaided reader of the specification would find himself to be placed, and adds additional force to the conclusion already expressed by us as to the want of exactitude pervading the whole specification.

Having arrived at the conclusions already stated we might be

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content to say no more, but nevertheless it will be well to express our opinion on the subject of infringement, as it has been strongly argued on the other side that the Defendants' plan of manufacture is within the Plaintiffs' patent, and, on the other, that it is essentially different. The subjects of comparison are the 3rd process of the Plaintiffs' specification and the process described by the Defendants and Dr. *Wright* as pursued at the Defendants' works.

The points of difference which have been chiefly insisted on are the following:—(1.) That the Defendants use ordinary or non-fuming sulphuric acid to produce their sulpho-acid of naphthylamine, whereas the first way indicated by the Plaintiffs' 3rd process, as well known, was that of *Schmidt* and *Schaal*, which was by the use of fuming sulphuric acid, as is further shewn by the second example given by the Plaintiffs under the 3rd process. (2.) That the diazo process used by the Defendants does not involve solution, whereas that indicated by the Plaintiffs by reference from the 3rd to the 1st process does proceed by solution. (3.) That the Defendants use carbonate of soda, and not any caustic alkali. (4.) That instead of using equal quantities of the diazo compounds and naphthol for combination, the Defendants use an excess of the diazo body. (5.) That in the Plaintiffs' plan the sulpho-acid, the diazo body, and the naphthol, are all used in solution, whereas the Defendants use each of these substances in a practically insoluble state; and (6.) That the Defendants do not precipitate by the use of a sodium salt, but obtain their dyeing substance by crystalization from the mother liquid. After giving our best consideration to the evidence and arguments on these points, the conclusion at which we have arrived is that if the specification had been good the Defendants' process would have been an infringement of it, though it might have been an improvement on the Plaintiffs' process.

For the reasons already given, we are of opinion under the circumstances, though not without distrust of our own judgment, that the appeal ought to be allowed, and the action dismissed with costs in this Court and in the Court below.

1885. March 21. The case was again considered on the question of costs.

Aston, Q.C. (*Webster*, Q.C., and *Lawson*, with him), for the Plaintiffs:—

Mr. Justice *Pearson* gave us a certificate under the 15 & 16 Vict. c. 83, s. 43, that the validity of the patent had been in question, and that the Plaintiffs had proved the infringement. The Court of Appeal, while holding that the patent is invalid, has expressed its opinion that if the patent had been valid the acts of the Defendants would have been an infringment of the patent. Therefore the Plaintiffs have succeeded on the question of infringement though they have failed in the action generally. We ask, therefore, that the costs may be apportioned, and that we may have the costs of the issues as to the infringement, which may be set off against the general costs of the action. The case is governed by the 15 & 16 Vict. c. 83, s. 43, as the judgment was delivered before the present Act, 46 & 47 Vict. c. 57, came into operation. In *Wegmann* v. *Corcoran* (1) Mr. Justice *Fry* gave the defendants the costs of the particulars of objections to the validity of the patent, but gave the plaintiffs the costs of some of the particulars of breaches. The same was done in *Young* v. *Rosenthal*, before Mr. Justice *Grove* (2); and in *Simmonds* v. *Hitchman* (3) Vice-Chancellor *Bacon* apportioned the costs in like manner where the plaintiff had succeeded as to the validity of the patent but failed as to the infringement (4). The new Act 46 & 47 Vict. c. 57, although it repeals the Act of 1852, yet by sect. 29, sub-sect. 6, enacts that on taxation of costs the plaintiff and defendant respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court to have been proven, or to have been

(1) 27 W. R. 357.

(2) Patent Office Reports, p. 41.

(3) Lawson's Patents, Designs, and Trade-Marks Practice, p. 332.

(4) 1881. Feb. 4. In that case Vice-Chancellor *Bacon* said: The costs, which are by far the most serious consideration affecting the Defendant himself, must be taken according to the justice of the case. The costs of the suit as far as relates to the futile attempt to dispute the Plaintiff's right to a patent invention, must be borne by the Defendant. The costs of the Plaintiff's futile attempt to restrain the Defendant from doing that which I think by law he is entitled to do, his patent not being an imitation or piracy of the Plaintiff's, the Plaintiff must pay him, and the one set of costs must be set off against the other.

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reasonable and proper, without regard to the general costs of the case. So that the Court still has power to apportion the costs on the same principle as under the Act of 1852.

BAGGALLAY, L.J.:—

We are all agreed that the rule adopted by Lord Justice *Fry* in the case of *Wegmann* v. *Corcoran* (1) appears to us to be not only applicable to the circumstances of the present case, but to be in accordance with the provisions of the new Act, although the old Act was in force at the time when *Wegmann* v. *Corcoran* was decided, and also at the time this action was commenced. In that case the patent was held invalid by reason of the want of a sufficient description of the processes, and the Court accordingly gave the defendants the general costs of the action; but as regards certain points which were raised on one side or the other the Court apportioned the costs according to the success of the parties.

Higgins, Q.C. (*Chadwyck Healey*, with him), for the Defendants:—

If this case is to be decided in accordance with the Act of 1852 there is no obligation on the Court to grant a certificate or to give any costs to the Plaintiffs. It is a question of discretion. If the patent is invalid the Court will not give the Plaintiffs the costs of the particulars of breaches: *United Telephone Company* v. *Harrison, Cox-Walker & Co.* (2). In the present case the Defendants have not increased the costs of the action by anything they have done. They admitted at once the facts alleged in the particulars of breaches. They did not deny having made and sold the dye, they only disputed the legal effect of doing so.

BOWEN, L.J.:—

I am of opinion in this case that the Plaintiffs should have the costs occasioned by the issues raised by the particulars of breaches, and that in respect of all the other costs the costs in the action

(1) 27 W. R. 357. (2) 21 Ch. D. 720.

should follow the usual result and be awarded to the successful party. It seems to me that, without laying down any hard and fast line, or trying to fetter our discretion at a future period in any other case, we are acting on a sensible and sound principle, namely, the principle that parties ought not, even if right in the action, to add to the expenses of an action by fighting issues in which they are in the wrong. It may be very reasonable as regards their own interest, and may help them in the conduct of the action, that they should raise issues in which in the end they are defeated; but the defendant who does so does it in his own interest and I think he ought to do it at his own expense. The order, therefore, I think ought to be what I have stated.

FRY, L.J.:—

I am of the same opinion. I think that the principle to which the Lord Justice has referred is a sound one to apply to this case. I agree with him that in applying that principle to this case we are not fettering ourselves or other Judges in the exercise of their discretion in other cases which may be different from the present. But I think we are acting in accordance with the spirit of the Act of 1852, which, although not binding upon us, certainly indicates the principle which we should be willing to follow. In coming to that conclusion, I have the additional satisfaction of saying that Lord Justice *Baggallay* (1) agrees with the conclusion at which we have both arrived. Therefore the result will be that the Defendants will pay to the Plaintiffs the costs occasioned by the issues raised by the particulars of breaches, that the Plaintiffs will pay the Defendants all the other costs of the action, and there will be a set-off in respect of costs.

Higgins, Q.C., asked for a certificate under 15 & 16 Vict. c. 83, s. 43, that the validity of the patent came in question in the action.

BOWEN, L.J.:—We cannot give you a certificate. The provision in the Act only applies to a patentee.

(1) His Lordship had left the Court before the conclusion of the argument.

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BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

FRY, L.J., concurred.

Their Lordships subsequently said that the apportionment must apply to the costs of the appeal as well as to the costs in the Court below. The order eventually made was in the following terms:—

Upon motion by way of appeal, &c. This Court doth order that the said judgment be reversed, and it is ordered that the Plaintiffs' action do stand dismissed. And it is ordered that the Plaintiffs do repay to the Defendants the sum of £2242 19*s.* 2*d.*, being the amount of the costs of the said judgment already paid by the Defendants to the Plaintiffs. And it is ordered that it be referred to the Taxing Master to tax, (1) the Defendants their costs of the action other than the costs occasioned by the issue or issues raised by the particulars of breaches in the said judgment mentioned, but including in the Defendants' costs the costs of transcribing and printing the short-hand notes in the Court below, and the costs of Professor *Roscoe's* report in the judgment mentioned; (2) the costs of the Defendants occasioned by the said appeal other than their costs occasioned by the issue or issues raised by the particulars of breaches aforesaid; and (3), the costs of the Plaintiffs of the said action, as well in the Court of Appeal as in the Court below, occasioned by the issue or issues raised by the said particulars of breaches. And it is ordered that such costs of the Plaintiffs be set off against such costs of the Defendants. And the Taxing Master is to certify to whom, after such set-off, the balance is due. And it is ordered that the party from whom such balance is due pay the amount to the other party.

Solicitor for Plaintiffs: *J. H. Johnson.*
Solicitors for Defendants: *Gregory, Rowcliffes, & Co.*

M. W.

In re FLORENCE LAND AND PUBLIC WORKS COMPANY.

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TUFNELL & PONSONBY'S CASE.

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1883
CHITTY, J.
Nov. 26.
1884
Jan. 16, 17.
C. A.
1885
Jan. 20. 22.

Company—Contributory—Contract to take Shares—Cancellation of Shares—Rescission of Contract—Companies Act, 1862, *s.* 23 [*Revised Ed. Statutes, vol. xiv., p.* 207].

W. T. & P. applied for shares in a limited company established for the purpose of purchasing and working a concession from a foreign Government. *T. & P.* were directors of the company. The directors sent letters of allotment to the applicants, in which they called on them to pay the allotment money by a certain day. But their names were never entered on the register, nor was any allotment money paid nor certificates of shares issued. Three years afterwards the directors made a fresh arrangement with the owners of the concession under which they purported to cancel the old allotments and to allot all the shares, except a few reserved for the directors and other persons, to the vendor of the concession and his nominees. The shares were accordingly entered in the register in their names. Soon afterwards the company was ordered to be wound up, and the liquidator applied to the Court to rectify the register by placing on it the names of *W. T. & P.* for the number of shares allotted to them, and to diminish the number of shares for which the vendor of the concession was entered on the register to a like amount:—

Held (affirming the decision of *Chitty*, J.), that whether the effect of the application and allotment was that *W. T. & P.* became actual members of the company in respect of the shares allotted to them or only agreed to become such members, it was now too late, under the circumstances which had occurred, for the company to insist on placing their names on the register.

But, *semble*, according to the true construction of the 23rd section of the *Companies Act*, 1862, they did not become members in respect of the allotted shares, the entry on the register being a condition precedent to such membership.

Held also, that the fact that *T. & P.* were directors whose duty it was to place the allottees on the register did not affect the question.

THE *Florence Land and Public Works Company, Limited*, was incorporated on the 25th of January, 1866, under the *Companies Act*, 1862, with a nominal capital of £500,000, divided into 25,000 shares of £20 each. The object of the company was to purchase a concession granted to Mr. *H. D. Davies* by the municipal corpor-

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ation of the city of *Florence*, for the execution of extensive works for the improvement of the city, and to carry those works into execution. The memorandum of association was signed by Mr. *J. R. Tufnell* for fifty shares, and the Hon. *A. G. J. Ponsonby* for 100 shares, and five other gentlemen. Mr. *Tufnell* was named in the articles as the first chairman of the company and Mr. *Ponsonby* as one of the first directors. The qualification of a director was fifty shares.

Negotiations having been commenced with the *Agra and Masterman's Bank* to open a credit for the company for a large sum of money, the bank consented to the proposal on the condition that a certain number of shares were *bonâ fide* subscribed for. In consequence of this a memorandum of agreement was prepared in the following terms:—

"We, the undersigned, hereby consent and agree to take the number of shares in the capital of the above company set opposite to our names, and to pay the sum of £8 per share into the hands of the bankers of the company on or before the 1st of February, 1867, and we further agree to sign the articles of association when required.

"25th January, 1866."

This memorandum was signed by seventy-one persons, among whom Mr. *Tufnell* signed for 250 shares, Mr. *Ponsonby* for 250, and Mr. *Joseph Wilkinson* (who was not a subscriber of the memorandum of association) for 100. The solicitor of the company having advised that this memorandum of agreement would not be sufficient to constitute the subscribers shareholders without an allotment of shares to them, a letter of allotment, signed by the secretary of the company, was sent by order of the board on the 12th of April, 1866, to each of the subscribers in the following form:—

"Sir,

"I beg to inform you that the directors have allotted you —— shares in this company.

"In accordance with the memorandum of agreement signed by you, you will have to pay to the *Agra and Masterman's Bank, Limited*, the bankers of the company, on or before the 1st day of

February, 1867, the sum of £——, being £8 per share in respect of such shares, together with interest thereon at the rate charged by the *Bank of England* from time to time (in no case to be less than £5 per cent.), a calculation of which will be sent to you in due course.

"If you desire to anticipate the payment of the whole or any part of this amount, you may do so on or before the —— without any payment of interest by presenting the inclosed form of receipt to the company's bank, with a remittance afterwards. It will be necessary to give me an intimation of such intention, so that a calculation may be made as above, and an account made out which will have to be presented to the bankers with a remittance and the inclosed receipt.

"The articles of association will lie at this office for signature, and I am directed to request that you will have the goodness to call here for the purpose of signing the same as soon as you conveniently can.

"The share certificates will be ready for delivery in exchange for the bankers' receipt at any time between this and the 1st of February, 1867."

The total number of shares thus allotted was 20,220.

The names of the allottees, however, were not entered on the register of members, and no share certificates were issued to them; nor was any money paid by them in respect of the shares.

In June, 1866, the *Agra and Masterman's Bank* stopped payment, and the above mentioned memorandum and letters of allotment appear to have been treated as inoperative.

In December, 1866, Messrs. *Tufnell* and *Ponsonby* resigned their offices as directors of the company. On the 1st of January, 1867, Mr. *Tufnell* transferred his original fifty shares to *H. D. Davies*, and Mr. *Ponsonby* also, about the same time, transferred fifty of his 100 original shares to *C. N. Cresswell*.

By an indenture dated the 15th of July, 1867, and made between the company of the one part and *H. D. Davies* and *J. T. Campbell* of the other part, after reciting, among other things, that *Davies* and *Campbell* had agreed to accept an allotment of 24,350 fully paid-up shares of the company in satisfaction of two sums of £80,000 and £50,000, with further advances which were due

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to them from the company, and that by a resolution of the directors of the 12th of July, 1867, that number of shares had been allotted to them or their nominees, *Davies* and *Campbell* in consideration of the allotment released the company from all claims upon them in respect of the above mentioned debts.

On the 24th of March, 1868, another deed was executed between the same parties by which it was agreed that the previous agreement should be varied, and that a sum of cash should be paid to *H. D. Davies* and *Campbell*, and that 11,850 shares only should be allotted to them.

By a third indenture, dated the 23rd of March, 1869, and made between the company of the one part, and *H. D. Davies* and *J. T. Campbell* of the other part, a fresh arrangement was made under which it was agreed that the company should pay *Davies* and *Campbell* £80,000, and should allot them or their nominees 24,350 shares, numbered from 651 to 25,000, on which £10 each should be taken as paid, and that *Davies* and *Campbell* should release the company from all claims upon them. This deed was duly registered on the 21st of April, 1869. In accordance with this agreement the board of directors on the 6th of April, 1869, passed a resolution cancelling the allotment of 20,200 shares, and the subsequent allotments of 24,350 and 11,800 shares, with the exception of 650 shares numbered 1 to 650, and allotted 24,350 to *Davies* and *Campbell* and their nominees.

On the 21st of April, 1869, a return was made for the first time to the Registration Office of the 25,000 shares in accordance with this allotment, and similar returns were made in each year until the winding-up of the company. On the 16th of November, 1877, an order for winding-up the company was made on a petition presented in the month of July previous. At that time the register of shares comprised the whole capital of 25,000 shares with £10 paid on each share, which were divided between fifteen persons. Of these, *Davies* had 18,860 shares, *Campbell* 2,290, and *Ponsonby* 50. Neither *Tufnell's* nor *Wilkinson's* name appeared on the register.

Wilkinson died in October, 1868, having appointed *J. Nicol* his executor.

The official liquidator now applied to the Court to rectify the

register by striking out 100 of the shares of *H. D. Davies*, and entering them as the shares of *J. Wilkinson*.

The summons was heard before Mr. Justice *Chitty* on the 26th of November, 1883.

Davey, Q.C., *Romer*, Q.C., and *Ingle Joyce*, for the official liquidator.

Macnaghten, Q.C., and *Daniel Jones*, for *Nicol*, *Wilkinson's* executor.

Ince, Q.C., for *Davies*.

CHITTY, J.:—

This is an application by the official liquidator to place the executor of Mr. *Wilkinson*, upon the list of contributories for 100 shares. Mr. *Wilkinson's* name has never been on the register of members of the company; from the year 1869 downwards the register of members has been filled up, and all the shares of the company appear to be held by members of whom Mr. *Wilkinson* is not one. The liquidator has proved to my satisfaction that in the year 1866 there was a complete contract to take shares on the part of Mr. *Wilkinson*. The contract is shewn in this way. There is what was termed "an agreement" signed by Mr. *Wilkinson* and other gentlemen, by which they consented and agreed to take a number of shares in the company set opposite to their names. That of itself of course was not an agreement. In point of law that was only an offer, and the offer required acceptance on the part of the company. Beyond all question the company accepted it; they accepted it possibly by their having handed the document itself to the *Agra* and *Masterman's Bank*, who were able to make advances. However that may be, the company clearly accepted the offer in the manner I am about to mention. In the usual way the directors met, and they resolved to allot the shares to the persons mentioned in what I have already called the "offer," including Mr. *Wilkinson*, and they notified that to Mr. *Wilkinson*. Accordingly, there was a complete contract on the part of Mr. *Wilkinson*, also binding on the company, to take 100 shares. The form of the resolution was,

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that the directors allotted 100 shares to him, and the argument before me has proceeded to a great extent on the meaning of the word "allot." There is no difference, as has been often pointed out, between a contract to take shares and any other contract. What is termed "allotment" is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in the offer or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance. To my mind there is no magic whatever in the term "allotment" as used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares. It does not, however, make the person who has thus agreed to take the shares a member from that moment; all that it does is simply this—it constitutes a binding contract under which the company is bound to make a complete allotment of the specified number of shares, and under which the person who has made the offer and is now bound by the acceptance is bound to take that particular number of shares. In most cases the act of placing the person who has agreed to become a member on the register is a mere matter of form, and may be described as a mere ministerial act; but it appears to me that in point of law all that is done by the process I have just indicated, and all that was done in this case, was to make a complete and binding contract. As Lord Justice *Baggallay* said in *In re Scottish Petroleum Company* (1), "to constitute a binding contract to take shares in a company when such contract is based upon application and allotment, it is necessary that there should be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made." There Lord Justice *Baggallay* used the term "allotment" in what appears to me to be the proper sense of the term. It is only as

(1) 23 Ch. D. 413, 430.

constituting one of the steps which go to form a complete contract. There have been other cases in which the term has been used by Judges, but I am satisfied that all they meant was that there had been, in the particular case before them, complete allotment; that is, that the name of the person who had "agreed to become a member," to use the language of the 23rd section of the Act, had been entered upon the register. Where the contract exists and no question of delay or acquiescence arises, I repeat that the placing of the name of the person who has agreed to become a member upon the register is a mere formal act, and it may be performed at some considerable interval of time. In most cases it is, of course, the duty of the directors, immediately after the so-called allotment, that is to say, the notification of the acceptance of the offer, to place the person's name on the register of members.

In this case, as I have said, the register, since the year 1869, has been filled in so as to exhaust the total number of shares which could be taken in the company, and Mr. *Wilkinson's* name is not to be found on the register. What apparently was done was this. In 1869 the directors resolved to cancel the former allotment, and made new allotments to the extent I have mentioned; and they made a complete allotment by entering on the register the names of the persons who had thus agreed in 1869 to become members in respect of the whole of the shares.

The question really turns upon the Act of Parliament. I may state that, according to my recollection, the term "allotment" is not even mentioned in the Act anywhere. The term "allotment" is a popular term: it is not a technical term occurring in the Act of Parliament itself. The 23rd section says this: "The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned." Now, stopping there, the decisions are quite clear that, where a person has signed the memorandum, and afterwards the company have made a complete allotment of all the shares in the company by entering on the register the names of other persons who also agreed to become

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members, in the winding-up the Court will not place even the person who has signed the memorandum on the list of contributories. Why is that? Because the portion of the section which I have read makes the signing of the memorandum the agreement, and then requires the further proceeding of placing that person's name upon the register as a member. That is the construction which has been adopted by the Courts, and is settled law, with reference to the earlier part of the 23rd section. The second part of the section is this: "And every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." The effect of the legislation in this part of the section is identical with the legislation in the earlier part, the only difference being that the signing of the memorandum is by statutory enactment to be deemed to be a contract to take shares, whereas in the case of other persons you must have an actual contract to take the shares; and in both cases the name is to be entered upon the register of members.

It seems to me that all the decisions in the earlier part of the section apply with full force to the case which is now before me. If anything, this is an *à fortiori* case, seeing that the 18th section of the Act enacts that "the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company shall thereupon be a body corporate." The persons who have subscribed the memorandum do at once constitute a corporate body. Again, the language of that section tallies with that of the 23rd section. It is not "together with such other persons as may from time to time agree to become members;" but "together with such other persons as may from time to time become members."

The result, therefore, appears to me to be quite clear that the liquidator is in the position in which the company would have found itself if there had been no winding-up and the company were endeavouring to enforce specific performance of this contract. The answer, of course, would be plain: there has been such delay before the winding-up—eight years or more having been allowed to elapse and this application not having been

made until within a recent period—that the Court would refuse to enforce specific performance. On that ground alone this application fails. If the persons who had agreed to become members had acted as shareholders the consideration would have been entirely different; but both parties, that is to say, the company on the one side and Mr. *Wilkinson* on the other, have acquiesced in this state of things, that Mr. *Wilkinson* should not be treated as a member. He has never on any occasion attempted to assert his right, and he seems in the year 1869, when the act of cancellation took place, to have submitted to it: but whether he submitted to it or not, it is quite plain, since then, that he has acquiesced, and that if he or his executor were to come now and say, "I am a member; put me on the list of contributories, because there will be a surplus to be divided in the winding-up of this company," his application would be refused, just as much as I think the application of the liquidator ought to be refused now.

I should say that, to avoid any technical question, I allowed the summons to stand over in order to serve the other persons whose names appear upon the register. They do appear: they have argued that there is no case against them made for rectifying the register: they claim to be allowed to hold the shares which they purport to hold for the long period I have mentioned, namely from 1869; and therefore it is impossible for me to exercise the power which is conferred upon the Court in the winding-up to rectify the register of members as against them, or indeed, as I think, against Mr. *Wilkinson*. The result is that the application fails.

I ought to say this—that, although these directors have not power to accept a surrender of the shares, yet they were the managers of the company, and the company itself have, just as in the case of any ordinary individual corporation that has entered into a contract of which specific performance is sought either by them or against them, created an equity against themselves; and this is an equity which Mr. *Wilkinson*, by resisting what is in substance a suit for specific performance, is setting up, and it appears to me successfully. Therefore no question arises as to the act of the directors being *ultrà vires*, because they have no power to accept surrenders. It appears to me that Mr. *Wilkinson's*

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executor has succeeded, and I therefore refuse the application.

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A similar application was afterwards made by the official liquidator respecting the shares of *Tufnell* and *Ponsonby*. The summons came on to be heard before Mr. Justice *Chitty* on the 16th of January, 1884.

Davey, Q.C., *Romer*, Q.C., and *Ingle Joyce*, for the official liquidator.

Macnaghten, Q.C., and *Buckley*, for *Tufnell* and *Ponsonby*.

Ince, Q.C., for *Davies*.

CHITTY, J.:—

The substantial difference in point of fact between this case and *Nicol's Case*, which I decided a short time ago, is that Mr. *Tufnell* and Mr. *Ponsonby*, whom the liquidator now seeks to put upon the list of contributories, were directors at the time when the earlier transactions in question took place, they having been directors from the incorporation of the company until December, 1866, when they resigned. Being directors, it is said on the part of the liquidator, and rightly said, that it was their duty as officers of the company to see that their names were duly entered on the register of members in respect of the shares that they had agreed to take; and the evidence shews that not only was this duty not performed by them, but there is some evidence, namely, that of the secretary, which shews that they interfered to stop his making any entry in respect of these shares against their names, or against the names of any other persons who had agreed to take them, in the company's books.

Now undoubtedly here, as in *Nicol's Case*, there was a binding contract on the part of these directors to take the shares. There is a contention raised, rather on the affidavits than at the Bar, that the contract which they entered into to take the shares was a conditional contract; but on the documents which passed between them and the company, consisting of that list of subscribers

which was handed to the *Agra and Masterman's Bank*, and the acceptance shewn by the allotment, and the communication of the allotment, I am clearly of opinion that there was no condition at all, and that there was here, as in the other case, an absolute binding contract on their part to take the shares.

Then it is said in this case that, as directors, they held themselves out as liable on these shares. Undoubtedly they did, so far as the *Agra and Masterman's Bank* was concerned, and I should have no hesitation in saying that, as between them, and indeed as between all the persons who subscribed that list for the particular purpose of being handed to the *Agra and Masterman's Bank*, the *Agra and Masterman's Bank* would be in a position to say, "We will hold you in any view of the case to your representation, and whether you are or are not actual shareholders, we will treat you as such in any claim that we may make." But that would be the right of the *Agra and Masterman's Bank*, and the *Agra and Masterman's Bank's* claim has been satisfied; and really that point does not arise in this case, because if there were an estoppel as between these directors, and the other persons who subscribed the list as between themselves and the *Agra and Masterman's Bank*, the estoppel would end there and could not be made use of for the general purpose of the question that I have to decide.

On the failure of the *Agra and Masterman's Bank* these gentlemen, Mr. *Tufnell* who was the chairman of the board, and Mr. *Ponsonby*, acting honestly, determine that they could not go on with the company. They had expected beyond all question to get a large advance from the *Agra and Masterman's Bank*, and the *Agra and Masterman's Bank* failing that source of money failed also, and they thought it was not prudent to go on with the concern. As I have already stated, they resigned their office of directors in 1866, and from that time they had nothing whatever to do with this company. Other directors were appointed, who, with Mr. *Davies* a member of the firm of the solicitors of the company, appeared to have determined ultimately to carry it on, and from the time when the new directors were appointed, it became of course the duty of those new directors to see that Mr. *Tufnell's* and Mr. *Ponsonby's* names were inserted in the

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register of members, and that was not done. Mr. *Tufnell* and Mr. *Ponsonby* could only have insisted upon the performance of the duty adversely to the company, by coming to the Court to rectify the register under the 35th section. [His Lordship then referred to the facts relating to the execution of the deed of the 23rd of March, 1869, and continued:—] Now I take it, it is settled law that a liquidator in cases of this kind, can only make against the alleged shareholders the same claim that a company could make, he stands in the same position as the company for this purpose. That proposition was stated by Lord *Westbury* in the well-known case of *Waterhouse* v. *Jamieson* (1), and also by other Judges, including *James*, L.J., in the case of *In re Dronfield Silkstone Coal Company* (2). It has been said that the proposition has been asserted in too large terms; but as far as the case before me is concerned, I consider that the proposition may be so stated without any exception. I mean that if there be any exceptions to the generality of the proposition, they are not exceptions which would apply to this case. *James*, L.J., stated the proposition in this way (3): "The liability of the shareholders is to the company, and to no one else, except as regards the provisions relating to the liability of past members." He puts in that exception, if it be an exception, with reference to the provisions of the *Companies Act*, as to shareholders who are put upon list B, that is, those who have been past members for less than a year before the date of the winding-up.

There may be other exceptions, for instance there is this one, that a shareholder who comes to set aside the contract under which he has taken shares after the commencement of the winding-up is too late, and the liquidator has as against him a better case than the company itself would have. I mention those two exceptions, or apparent exceptions, to the generality of the rule, and there may possibly be one or two others. I only say there may be, and at this moment they are not present to my mind, but if there be any others they would have no application to this case.

The question, then, is, could the company just before the date of the winding-up (assuming of course for the purpose of putting

(1) Law Rep. 2 H. L., Sc. 29. (2) 17 Ch. D. 76.
(3) 17 Ch. D. 97.

the case fairly that there was no contemplation of a winding-up at the time) have succeeded upon any motion such as this, or in any action seeking such relief as is claimed against these two gentlemen? In my opinion it could not. Mr. *Davies* undoubtedly had notice of all these transactions. But Mr. *Davies*, for reasons which seem to him to be good, insists that he has the shares under the contract I have mentioned. They are duly registered in his name, and he insists upon holding them. The directors say, and he says, that there is no ground for taking away the shares from him, that is to say no sufficient grounds on the part of the company, the company now being represented by its liquidator, and if there is no ground for taking away the shares from Mr. *Davies*, then it follows as a matter of course that there are no shares which can be attributed to these directors.

Now in the reply rather than in the opening it was suggested that the deed that I have mentioned was a fraudulent deed. I see no ground for impeaching the deed upon the evidence whatever. The deed was honestly entered into, and I think it would be going too far in this case, on such evidence as there is before me, to say there was any such fraud in it. The company got full value for the shares on the facts as they stand, and I am not at liberty to go beyond them or behind them. The debt which was released, and in respect of which £10 was credited on the shares, appears to have been a *bonâ fide* debt. So that they got £10 paid on the shares.

There would have been a necessity, in order to avoid the difficulty of the provision of the Act of 1867, that the contract should be registered, and that that should be expressed on the contract, but that was got over by the deed, and they got £10, therefore, on the shares at the time, and they had Mr. *Davies*' liability for the remainder. That transaction was not entered into by these directors—Mr. *Tufnell* or Mr. *Ponsonby*—or by any of the board of which they were members, but by a board which had been subsequently constituted.

Now it is said that Mr. *Davies* stated in his deposition that he had practically control of the company from soon after the failure of the *Agra and Masterman's Bank* until its winding-up. I accept that statement as it stands, both for him and against him. But if

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it is a question of fraud, supposing the company had come at the time I have mentioned to set aside this deed, there would have been the lapse of time. The company would have known of the transaction for nine years, and would have been coming then on the ground of fraud, after the lapse of nine years, to set aside the deed. Then, if this kind of proof had been given in the action that Mr. *Davies* had the practical control, and held substantially all the shares in his own right, by himself or by his nominees, the case of acquiescence would have been complete and unanswerable. So that it appears to me that on that ground the company could not have succeeded. Of course, in law the company would have been estopped, still subject to any question on a point of law about fraud. They would have been estopped, because they have issued certificates to Mr. *Davies* and his nominees, and recognised them as shareholders, and dealt with them as shareholders, from that time in 1869 downwards.

Then it is said, that argument being thus disposed of, that the transaction was *ultrà vires*, and there was a little confusion in the argument in respect to this question of *ultrà vires*. Of whom? At first it was suggested *ultrà vires* of the company. That means that the company had no power to enter into the contract, that they were incapacitated by their instrument of incorporation from entering into it. But could that case be maintained? I put, during the argument, this illustration, which I will repeat now. Suppose a man had agreed to take shares in a company, not being a director, and before the shares had been registered in his name another person came forward and said: "Let me take the shares instead of Mr. *A.*; substitute me for the person who has agreed to take the shares;" would that be *ultrà vires* of the company, there being no objection, I will presume, to the person who is proposed to be substituted? It appears to me it would not. Where a man is on the register, I agree the only way in which he can get rid of his liability is by transfer, but where he is not on the register I see no ground for saying that the company could not, if they thought fit, allow that species of equitable transfer which I have indicated in the case I have put, to take place. I see no reason for saying that that would be beyond the powers of the company.

The question is whether what has been done here is not equivalent to that. Now fraud being out of the case, it appears to me that in substance the case comes round to that very simple one which I have put by way of illustration. There is nothing to shew that Mr. *Davies* was not considered at the time a solvent man, or capable, either by himself or by his nominees, of answering the liability on these shares. These persons—Mr. *Ponsonby* and Mr. *Tufnell*—were, as I have already said, not directors at this time. They did not come forward actually and ask that Mr. *Davies* should be substituted for them, but having regard to what has taken place, the lapse of nine years without any claim being made by them, and now being called upon, of course they repudiate any such claim—it appears to me that by their conduct and acquiescence they have done that which is equivalent to assenting to this transaction. If the company had turned out a success, which is a very fair way of looking at the case, and these gentlemen came forward now and said, "What has taken place, although nine years and more have elapsed, was altogether wrong, restore us to our position; strike out Mr. *Davies*, and let us have the benefit of the shares and recover all the dividends" (I am assuming now a case of prosperity), it would be absurd to suppose that such a case would succeed. To my mind, that would be an absurd proposition. If they tried to advance it, they could not by any means succeed.

Then I say the actual facts are not that there was an agreement under which Mr. *Davies* was substituted for Mr. *Tufnell* and for Mr. *Ponsonby*, but taking the facts as a whole, it appears to me that the case put at the bar is really equivalent to the one I have supposed.

Then it is said that if it is not *ultrà vires* of the company it is *ultrà vires* of the directors, that it was the directors who did it. Well, the persons who did this, that is to say, placed the shares in Mr. *Davies*' name, were the new directors, and they were acting as the agents of the company, but after the lapse of nine years, when the company has gone on and held its meetings and carried on all its business on the footing of Mr. *Davies* and his nominees being the shareholders, would not the company be deemed to have acquiesced in that which, on this hypothesis, was a mere

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excess of authority on the part of the directors. I hold clearly that it would be too late for the company to say the directors were acting *ultrà vires*.

One further observation remains to be made, and that is this, that if the transaction is *ultrà vires* of the company, which I think it is not, then, of course, that transaction is void altogether. This part of the case, no doubt, was one which had to be dealt with in *Nicol's Case*. The argument has been more elaborated in this, and I am not sure how far it was presented in that case. I will not pledge my memory to that, but the result would be, that the whole of those persons who subscribed that list would be now members; and if the case is, that the transaction was really *ultrà vires* the company, then notice to Mr. *Davies* is immaterial, because the company had no power to enter into the transaction. See what a strange position that leaves the liquidator in, because I will assume now for the purpose of trying the case that Mr. *Davies* was not aware of it; but still the whole transaction could be set aside. Suppose an innocent person had come in without notice of what had taken place before, and had taken shares, if it was *ultrà vires* of the company, as I say, notice is immaterial, and the transaction would fall to the ground, and be a nullity. That is a proposition which I cannot for one moment allow.

I perhaps ought to add one word upon the case of *Kipling* v. *Todd*, a decision of the Court of Appeal (1). The case before me is in many respects similar to that. In that case it was not proved that all the shares had been allotted. That is one distinction, and the other is, that the case being under the *Companies Clauses Act* there is a provision in the *Companies Clauses Act*, 1863, under which the company has power to accept surrenders, and what the Court did with reference to that part of the case was to infer from the facts before them, that there was a surrender, by which I understand them to mean not that they presumed there was an instrument of surrender, but that the facts really were equivalent to it. If I am right with reference to the former part of this judgment which, in effect, is this, that the matter by not having been perfected by registration of the shares in the names of these directors was still a matter resting in contract, then there would

(1) 3 C. P. D. 350.

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be the power, as I have endeavoured to shew in the earlier part of this judgment, on the part of the company to release the contract to take the shares. If that be so, the case of *Kipling* v. *Todd* (1) would not be in substance distinguishable from the one before me so far as regards contract. *Kipling* v. *Todd* was decided upon all the circumstances; and, as I say, the circumstances were very similar to those of the case before me, and it is an authority for some of the propositions which I have laid down.

It appears to me that the liquidator is not entitled to rectify the register of shareholders, and that he has the further difficulty in the case that he cannot set aside the contract which Mr. *Davies* entered into in part, but that he must, if he seeks to set it aside at all, set it aside *in toto*, and that, he has not even asked to do by his notice of motion, though some suggestion to that effect was made at the Bar. I think he cannot, as I say, set aside the contract *in toto*, and certainly he could get no relief if he only tried to set aside in part which is really the substance of the motion.

I think the application fails, with the usual consequences.

G. M.

C. A.

From both these decisions the official liquidator appealed. The appeals came on for hearing on the 20th of January, 1885.

Davey, Q.C., *Romer*, Q.C., and *Ingle Joyce*, for the Appellant:—

The cases of the three gentlemen, *Wilkinson*, *Tufnell*, and *Ponsonby*, whose liability is now in question, are the same in principle though they differ in some details. They were all subscribers of the memorandum of the 25th of January, 1866, and received the allotment letters, which were issued on the 12th of April, 1866. When these letters were received there was a binding contract to take the shares allotted, and they became shareholders and members of the company to the amount of those shares under sect. 23 of the *Companies Act*, 1862. It is true that they were not entered on the register, but that was only a ministerial act which it was the duty of the directors to perform, and which the allottees might at any time have compelled them to perform. There was a concluded contract from which neither party could recede:

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Ex parte Fletcher (1); *Forbes's Case* (2); *Kincaid's Case* (3). The subscribers to the contract had become owners of certain aliquot shares in the capital of the company, and the directors had no power to allot shares to others which had been appropriated to the subscribers. They could only allot the number of shares which were mentioned in the memorandum of association; any allotment beyond that was void: *Ferguson* v. *Wilson* (4). The fact that the shares allotted to the subscribers of the contract were not distinguished by numbers made no difference. Their interest in the capital of the company could not be affected by that circumstance. Shares may be transferred before they are registered; and if shares are transferred under the wrong numbers it is immaterial: *Ind's Case* (5). The directors were conscious that they had no power to issue shares which were already appropriated, and therefore they purported to cancel the first allotment. This they had no power to do. Having once become shareholders the subscribers could not be released from their liability except by transferring their shares in the ordinary way: *Stanhope's Case* (6); *In re Esparto Trading Company* (7); *Adams's Case* (8); *In re London and Provincial Consolidated Coal Company* (9); *Sidney's Case* (10); *Evans's Case* (11); *Migotti's Case* (12). *Mackley's Case* (13) is not consistent with the other authorities. In *Kipling* v. *Todd* (14), where a surrender of shares was presumed, there had been no allotment; there was only an inchoate right to the shares. It is suggested that all parties, the company and the subscribers of the contract, agreed that the first allotment should be treated as a nullity. But there never was any such agreement. The subscribers to the contract never took any steps to get their allotments cancelled; nor did any general meeting sanction the directors' resolution. The persons attending the general meetings were the new allottees, and until the old allottees were got rid of their votes were nugatory.

(1) 37 L. J. (Ch.) 49.
(2) Law Rep. 19 Eq. 353.
(3) Ibid. 11 Eq. 192.
(4) Ibid. 2 Ch. 77.
(5) Ibid. 7 Ch. 485.
(6) Ibid. 1 Ch. 161.
(7) 12 Ch. D. 191.
(8) Law Rep. 13 Eq. 474.
(9) 5 Ch. D. 525.
(10) Law Rep. 13 Eq. 228.
(11) Ibid. 2 Ch. 427.
(12) Ibid. 4 Eq. 238.
(13) 1 Ch. D. 247.
(14) 3 C. P. D. 350.

With respect to *Tufnell* and *Ponsonby*, their case differs only from *Wilkinson's* inasmuch as they were directors of the company, and the case is therefore stronger against them. It was their duty to put their own names on the register, and so to complete their membership. They cannot now be allowed to escape liability by their own negligence.

Macnaghten, Q.C., and *D. Jones*, for *Nicol*.

Macnaghten, Q.C., and *Buckley*, for *Tufnell* and *Ponsonby*.

Ince, Q.C., for *Davies*.

The counsel for the Respondents were not called on.

BAGGALLAY, L.J.:—

It appears to me that the questions for our decision are very clear when the circumstances are properly appreciated.

This company was formed under the *Companies Acts* on the 25th of January, 1866. The object of the company, as stated in the memorandum of association, was to purchase a concession from the municipal government of *Florence* for making public improvements in that city. It had a nominal capital of £500,000, divided into 25,000 shares of £20 each. From various causes, and probably among them from the shifting of the capital of *Italy* from *Florence* to *Rome*, the company failed. I need not enter into details as to its intermediate working, but pass from its birth to its death.

In July, 1877, a petition was presented to wind up the company, and in November in the same year a winding-up order was made. At that time there was a complete register of the holders of the whole 25,000 shares, shewing how the shares were held by fifteen persons in various proportions. It further appears that from July, 1869, the full number of shares had appeared in the register with the names of the persons who held them. In March, 1869, the shares were held by thirty-six persons, and the transmission of the shares by them to these fifteen persons is traced by a number of transfers in a regular way. Assuming, then, that the register was in proper form in March, 1869, it was in proper

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form in July, 1877. Six years after the company was ordered to be wound up, namely, in 1883, the official liquidator commenced proceedings to rectify the register—that is, fourteen years after the holders of all the shares had been shewn on the register, and this was done not in respect of any recent transaction, but on the ground of certain facts which had occurred before 1869 when the register was made complete.

It appears to me at the outset that it is a very extraordinary thing for any one to come fourteen years after the *status* of the shareholders has been established in legal form and everybody has acquiesced in it to alter that *status*; it would require a very strong case, such as fraud, after that length of time to disturb a state of things which has existed so long.

How does the liquidator proceed to rectify the register? It is done under the 35th section of the *Companies Act*, which provides for the rectification of the register of a company as a going concern, and the 98th section, which gives power to the Court in a similar manner to rectify the register where the company is being wound up. What are the allegations on which this is desired to be done in the present case? The allegation is that *Wilkinson*, *Tufnell*, and *Ponsonby* were all of them members of the company, according to the true construction of the Act of Parliament, at the time when the company went into liquidation, and that the register ought to be rectified by striking out the names in which some of the shares are registered, and substituting the names of these gentlemen.

I will first take the case of Messrs. *Tufnell* and *Ponsonby*, because they were directors of the company. *Ponsonby* had signed the memorandum of association in respect of 100 shares, which under the 23rd section of the *Companies Act* constituted an agreement by him to become a member in respect of that number of shares. He transferred fifty of those shares in the regular way, and they were held at the time of the winding-up by some other person. With respect to the remaining fifty shares, they are registered in his name, and there is no suggestion that he is not liable for them. *Tufnell* signed the memorandum of association for fifty shares; and they were both appointed directors by the articles of association, and the qualification of a director was to be fifty shares. So

that whether by their signing the memorandum, or by their acting as directors, I assume that each of these gentlemen was to take fifty shares. *Ponsonby's* liability for fifty shares is admitted, but *Tufnell* transferred his shares in a regular way, and therefore his name is not now on the list. But an additional liability has been suggested both as to them and as to *Wilkinson*, by reason of the document which was signed by them on the same day as the memorandum of association. The concession had been obtained from the Italian Government, but there being need of an immediate advance, and it being desired to give a sufficient guarantee to *Agra and Masterman's Bank* as well as to the municipality of *Florence*, of the ability of the company to perform its contract, a document was prepared and was signed by seventy-one persons, which has been called the subscription contract. It was in the form of a letter addressed to the directors, and by it the subscribers consented to take a certain number of shares in the company. From time to time the list was added to, and in April, 1866, it had been signed for 20,200 shares. This document was equivalent to an offer by the subscribers to take shares. It was not binding till it was accepted, it was an agreement to take shares if they were allotted. A communication was made by the directors to the solicitor of the company, asking whether this document was sufficient in itself to bind the subscribers, and he advised that it was not sufficient without an allotment being made of the shares. Accordingly, on the 23rd of March, 1866, a form of letter of allotment was approved by the board of directors, and on the 12th of April it was sent by their order to all the subscribers of the contract. It is not necessary to decide the point, but having regard to the ordinary rule, and bearing in mind that there was an offer to take shares, and a letter of allotment, I am strongly inclined to think that if there had been an appropriation of shares and a registration of those shares, with distinguishing numbers, the membership of the subscribers would have been completely constituted. But the question here raised is whether under the circumstances which occurred the subscribers had become actual members, or had only agreed to become members of the company. I do not intend to go into the question, beyond simply expressing my opinion that there was in this case no actual membership,

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although it would have been possible, if proper proceedings had been taken, to render the membership complete. But my present opinion is that there was no complete membership. However, I do not enter into an examination of the question, because in the view which I take of this case it is immaterial whether the subscribers to the contract were actual members or had only agreed to become members. Here we have an agreement by seventy-one persons to take 20,200 shares. Then subsequently there was a negotiation between the directors and Messrs. *Davies* and *Campbell*, and an agreement entered into by virtue of which a new allotment of shares was made, and the whole of the 25,000 shares were issued to various persons. This was a new appropriation of the shares altogether, and they were appropriated and registered with their distinguishing numbers. A considerable number of the old subscribers received shares under the new allotment, though that is, perhaps, not material. It is not necessary to go into the history of the three deeds that were executed. By the final arrangement in April, 1869, 24,350 shares were allotted to thirty-six persons in various proportions; thus every share was appropriated, and then for the first time they were registered in the names of the members by their distinguishing numbers. I am not prepared to say what might have been the case if any one of the subscribers to the contract of 1866 had come within a short period after the register was made up and said, "I applied for shares, and shares were allotted to me, and I now call on you to register me as a member." He might have had a right to require it to be done, he not being a party to the deeds of 1867, 1868, and 1869. But, whatever might have been such a person's right if he came within a reasonable time, I think the lapse of time is sufficient to debar the company from now insisting on the contract of 1866. It would be contrary to all moral justice to allow it to do so. If the view which I have taken is correct that there was only an agreement on the part of the subscribers to become members, the power of the company to enforce the agreement would be barred by the *Statute of Limitations*. If actual membership was constituted there might be a question whether the statute would apply; but I think, that no attempt having been made for so many years to enforce the rights of the company by

placing the subscribers on the register, it is now too late to do so. On the whole I think the conclusion to which Mr. Justice *Chitty* arrived is quite correct, and the appeal must be dismissed with costs.

BOWEN, L.J.:—

I only desire to add a few words, not because I differ from the views expressed by Lord Justice *Baggallay*, for I entirely agree with them, but in recognition of the able arguments which have been addressed to us.

It seems to me, in the first place, if I am bound to express an opinion for the purpose of our decision, though I do not think I am, that Mr. *Wilkinson* never acquired the *status* of a member of the company. I think that he remained with contractual obligations to the company, which the company had for a time a right to enforce against him. But, secondly, I think that if he did acquire the *status* of a member, that *status* has been destroyed under the circumstances that have happened, and the appeal must, in any view of the case, fail. It is said that he became a member by signing the list of subscribers, and by the act of the directors in sending him a letter of allotment. In considering a question of contract, as well with regard to shares as anything else, we must be careful not to adopt as a necessary legal definition the general business meaning of a term which in ninety-nine cases out of a hundred may be the proper meaning, and in the hundredth may not be applicable. Much litigation in company law has been caused by assuming that popular business terms always involve the same rights and liabilities. We must not treat business terms as if they were legal definitions in this way. We must not assume that all letters of allotment have the same effect. Taking the letter of allotment in the present case, I am by no means satisfied that it appropriated any shares to any subscriber of the subscription contract till something else had been done by him. But even assuming that it did, and that we have here a complete contract to take shares, followed by an appropriation of shares to him, still there was no entry on the register. Was the relation between the subscriber and the company still contractual? Was

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it still *in fieri?* or had he become a member of the corporation? According to the 23rd section of the *Companies Act* I think he had not become a corporate member. If so, the only remaining question is whether that which passed afterwards is not evidence that the contract was put an end to by rescission. Mr. *Davey* has called attention to cases in which delay has been held not to destroy the *status* of membership created by subscription of the memorandum of association. But the 23rd section defines the *status* of a subscriber of the memorandum in a different way to the position of other persons who agree to become members. From a comparison of the three sects. 6, 18, and 23, it is clear to me that the subscription of the memorandum is of itself the initial act in creating the corporate body. Under sect. 6, upon the registration of the company, a subscriber of the memorandum actually becomes a corporate member. Then sect. 18 says that on the registration of the memorandum and articles the corporate body comes into existence, and is composed of the subscribers of the memorandum and of all other persons who may from time to time become members. Then, by the 23rd section, subscribers of the memorandum are to be deemed to have agreed to become members, and upon the registration of the company "they shall be registered;" there is no option given in their case. The object of the provision, as pointed out in *Migotti's Case* (1), was mainly that the public might rest with confidence on the subscribers of the memorandum becoming members of the company. Neither the reason nor the language of the Act applies to other persons who afterwards agree to become members.

If, therefore, the contract was still *in fieri*, and corporate membership had not been acquired, we come to the question, Why should not the contract be rescinded? Mr. *Davey* and Mr. *Joyce* argued that *Wilkinson* was in equity a member of the company. He was not a member within the terms of the Act of Parliament. I do not doubt that at one time the company could have compelled him to become a member, and in that sense he could not deny his membership. But as a Court of Equity could have compelled him to be registered as a member if it was equitable to

(1) Law Rep. 4 Eq. 238.

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require it, so the Court could not compel it if circumstances had occurred which made it inequitable to do so. We have therefore to consider whether, after the lapse of time which has occurred, it is just that *Wilkinson* should be treated as a member as between himself and the company. I entertain the view that the contract was still *in fieri*, and I think the lapse of time and the conduct of the company in cancelling and re-allotting the shares, and the conduct of both classes of allottees, lead only to one conclusion, namely, that all parties had agreed that the contract should be put an end to, and therefore we get to a rescission of the contract. But assuming, on the other hand, that the *status* of membership had been acquired, I should still think that the company could so conduct itself towards its actual members as to make it unjust for it to deny that the *status*, if originally created, had been subsequently destroyed. If *Tufnell*, *Ponsonby*, and *Wilkinson* had all acquired the *status* of membership they could, by taking the proper course of transferring their shares, have deprived themselves of that character, and the company would have registered the new members. After the lapse of time I think the company must be held to be in the same position as if this change of membership had been regularly effected, and that it cannot now take advantage of the irregularity which has occurred after all parties have acquiesced in it.

FRY, L.J.:—

I am of the same opinion. On the 25th of January, 1866, *Tufnell* and *Ponsonby* signed the memorandum of association of the company, and on the same day the company was duly registered, and, according to my view of sect. 18 of the *Companies Act*, upon that registration *Tufnell* and *Ponsonby* became members of the company in respect of the shares for which they had subscribed, and although sect. 23 makes the entry on the register obligatory; it does not appear to me that entry on the register is a condition precedent, in the case of subscribers of the memorandum, to their becoming members. In fact, I cannot see how it can possibly be so; because until the company is formed no register can be made, and until there are some members the company cannot be formed. The short effect of sect. 18 is, in my opinion,

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to make these two gentlemen members of the company. As to the number of the shares for which they became thus responsible there is no question. Mr. *Tufnell* signed for fifty shares, and these he has transferred in ordinary course, and the transfers have been registered; Mr. *Ponsonby* transferred fifty of the 100 shares for which he signed the memorandum, and he admits his liability as to the remaining fifty. But on the same day a document was signed by these two gentlemen, by Mr. *Wilkinson*, and several others, which was in the form of a letter in these terms:—[His Lordship read the letter.] This document was signed by *Tufnell* and *Ponsonby* for 250 shares each, and by *Wilkinson* for 100 shares, and the question is whether *Ponsonby*, in respect of the 150 shares in excess of the 100 for which he subscribed the memorandum, and *Tufnell*, in respect of the 200 shares in excess of the fifty for which he subscribed the memorandum, and *Wilkinson*, in respect of 100 shares, are to be treated as members of the company. On the 12th of April, 1866, a document was sent to each of the subscribers of the subscription contract, which has been called the letter of allotment. I assume that it was sent in due time, and was an acceptance of the offer contained in the subscription contract; but it is important to consider the terms of this letter:—[His Lordship read the letter and continued:—] I may observe, in passing, that it is not clear that these gentlemen had offered to pay interest on their allotment money, but I will not dwell upon that. Now what are the duties to be performed by the subscribers who received this letter? Each of them agreed to pay £8 per share on or before the 1st of February, 1867, to pay interest at the bank rate, and to sign the articles of association when required. Did *Ponsonby*, or *Tufnell*, or *Wilkinson* do any of these things? The answer is, No. They did not pay the £8, they did not pay any interest, and they did not sign the articles of association. Then, what are the duties of the company under the contract? First, they were to send each allottee a computation of the interest; secondly, they were to assign to the shares proper distinguishing numbers; thirdly, they were to enter the names and addresses on the register with the distinguishing numbers of the shares; and, fourthly, they were to prepare certificates of the shares. Did the company

perform any of those duties? The answer again is, No. Therefore from the date of the contract there is a total absence of performance by both parties of their duties under it. Taking that view, the contract never was executed in the sense of all its terms being carried into effect so that nothing more remained to be done. There were acts remaining to be done on both sides, and therefore that contract never was executed.

Now sect. 23 of the *Companies Act*, 1862, makes the placing of the name of a shareholder on the register a condition precedent to membership. Although the Court has power to dispense with this under certain circumstances, that does not make it any the less a condition precedent. The question is whether the Court ought, looking at what has taken place in this case since 1866, to execute the contract by putting these gentlemen on the register. In my opinion, the conduct of both sides has been such that we are bound to consider that the contract has been rescinded by both parties.

I do not think it necessary to discuss the question how far a member can be relieved from his responsibility by the consent of both parties. I give no opinion on this point.

Solicitor for Official Liquidator: *Clements.*

Solicitors for Respondents: *Nicol, Son, & Jones; Campbell, Reeves, & Hooper; L. I. B. Rawlins.*

M. W.

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HOUSTOUN *v.* MARQUIS OF SLIGO.

[1883 H. 3928.]

Res Judicata—Estoppel—Cross Actions in English and Irish Courts—Pleading —Evidence of Proceedings in Irish Action—Report of Judge.

Held, by *Pearson*, J., that in order to raise the defence of *res judicata* it is not necessary to set forth in detail in the defence the pleadings in the other action the judgment in which is said to operate as *res judicata*, but, in order to judge whether the same questions were at issue in the first action as in the second, the Court will look at the pleadings in the first action, though they were not set forth in the defence in the second action. Whether a judgment obtained in one action before the trial of another can operate by way of estoppel as *res judicata*, unless the judgment was obtained before the issue of the writ in the second action, *Quære*.

On appeal by the Defendant an order was taken by arrangement.

Held, by the Court of Appeal, that a report made by an Irish Judge to a Divisional Court in *Ireland* to be used on an application to set aside the verdict, was evidence in an English action between the same parties of what took place at the trial and what the Judge decided.

An affidavit verifying the shorthand note of the judgment in the action pleaded as *res judicata* was also admitted.

THE writ in this action was issued on the 19th of September, 1883. By his statement of claim the Plaintiff alleged that by a lease dated the 19th of May, 1883, the Defendant had demised to him a farm, in *Ireland*, containing about sixty square miles, for a term of thirty-one years from the 1st of May, 1882. The Plaintiff alleged that on the true construction of the lease the Defendant had granted to him the exclusive right of hunting, coursing, and shooting upon and over the demised premises. The statement of claim further said that the Defendant alleged that, as a matter of law, the exclusive right of hunting, coursing, and shooting over the demised premises had been expressly reserved to him by the lease, and that the Defendant had given permission to friends to hunt, course, and shoot, and had employed his servants and agents in hunting, coursing, and shooting over the premises since the execution of the lease, and that the Defendant and the persons so authorized by him had declined to desist from so doing, and had expressed his and their intention of continuing so to do. The

Plaintiff claimed a declaration that he was entitled under the lease to the exclusive right of hunting, coursing, and shooting upon and over the demised lands; an injunction to restrain the Defendant, by himself or by his servants and agents or otherwise, from hunting, coursing, and shooting over the lands; and damages. The statement of claim was afterwards amended, and it then further alleged that if, as a matter of law, the exclusive right of hunting, coursing, and shooting had not in terms been granted by the Defendant to the Plaintiff by the lease, that right had, under the circumstances set forth, been omitted to be so granted by mistake, and that he was entitled to have the lease rectified; and, if necessary, the Plaintiff claimed rectification of the lease accordingly. The Defendant was residing in *England*. He delivered a statement of defence, by which he asserted that he was by the lease entitled to the exclusive right of hunting, coursing, and shooting over the demised land, and also that the lease correctly expressed the bargain between the parties, and that there was no mistake in it.

On the 22nd of September, 1883, the Marquis commenced an action in the High Court of Justice in *Ireland* against the Plaintiff *Houstoun*. By his statement of claim the Marquis alleged that the exclusive right of hunting, coursing, and shooting upon and over the land comprised in the lease was reserved by the lease to him, and that *Houstoun* had shot game on the lands, and claimed a right to continue to do so, and had prevented persons authorized by the Plaintiff from shooting on the land; and the Marquis claimed an injunction to restrain *Houstoun* from hunting, coursing, or shooting over the land, and from preventing the Plaintiff or any person authorized by him from so doing; and damages. By his statement of defence in this action *Houstoun* asserted a right under the lease to do the acts complained of, and by way of an alternative defence, alleged that, if by the lease the exclusive right of hunting, coursing, and shooting over the land was reserved to the Marquis, this reservation was inserted by a mutual mistake of the parties, and contrary to the previous agreement between them. On the 28th of February, 1884, the Irish action was tried in *Dublin*, before the Lord Chief Justice with a jury, when a verdict and judgment were given for the Marquis,

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with sixpence damages. Leave was reserved to the Defendant to move in the Exchequer Division on the questions of law and on the ground of misdirection by the Judge. The Defendant then obtained from the Exchequer Division a rule *nisi*, calling on the Plaintiff to shew cause why the verdict and judgment for him at the trial should not be set aside, and verdict and judgment thereon be entered for the Defendant pursuant to the leave reserved by the Judge at the trial, or why the verdict should not be set aside and a new trial had on the ground of misdirection of the Judge. On the 23rd of June, 1884, cause having been shewn against the rule, the Exchequer Division ordered judgment to be entered for the Marquis with sixpence damages and costs, and granted a perpetual injunction, restraining the Defendant from infringing the exclusive right of the Marquis of hunting, coursing, and shooting over the demised land. On the 11th of July, 1884, the Marquis obtained from Mr. Justice *Pearson* an order in the English action, giving him liberty, on or before the 15th of July, 1884, to re-amend his statement of defence, and to deliver it when re-amended to the Plaintiff, and the Plaintiff was to be at liberty within four days from the delivery of the re-amended statement of defence to re-amend his statement of claim. And it was ordered that the question of jurisdiction and the question of estoppel arising because of the pleadings and judgment of the Irish Court, and raised by the pleadings in the English action, should be set down for argument, and be argued before the point of law on the construction of the lease upon which the action had been put in the list for argument, and before the trial of any other issues in the action. On the 15th of July, 1884, the Marquis delivered a re-amended statement of defence, in which he stated shortly the proceedings in the Irish action, and the verdict and judgment, and that a certificate of the judgment had been duly registered in the High Court in *England*, pursuant to the Act 31 & 32 Vict. c. 54. And the Defendant said that he relied on the Irish judgment, and said that as a matter of law the Plaintiff was estopped from questioning the validity or effect of the lease. The pleadings in the Irish action were not stated in detail. The Plaintiff *Houstoun*, on the 19th of July, 1884, re-amended his statement of claim.

The question of the construction of the lease was now first argued, before Mr. Justice *Pearson* on the 20th of January, 1885.

Higgins, Q.C., and *R. C. Dobbs*, for the Plaintiff.

Fischer, Q.C., and *Mulligan*, for the Marquis.

PEARSON, J., held, in accordance with the decision of the Irish Court, that the exclusive right of hunting, coursing, and shooting was excepted out of the demise and reserved to the lessor.

The question of estoppel as regarded the claim to rectification was then argued.

Fischer, Q.C., and *Mulligan*, for the Marquis:—

The pleadings in the Irish action shew that the question of the right to a rectification of the lease was raised in that action, and there was a verdict for the Plaintiff simply.

[PEARSON, J.:—There is no estoppel unless everything which is in controversy in the one action was in controversy in the other: *Moss* v. *Anglo-Egyptian Navigation Company* (1).]

The Plaintiff has not traversed the statement of the result of the Irish action as set forth in the re-amended statement of defence. The Court is entitled to look at the pleadings in the Irish action.

Higgins, Q.C., and *R. C. Dobbs*, for the Plaintiff:—

The plea of *res judicata* is in the nature of a demurrer; the Defendant cannot adduce evidence. The Court cannot go outside the pleadings in the present action.

[PEARSON, J.:—Under the existing Rules of Court a party cannot plead evidence.]

The Defendant was at liberty to state everything which was necessary to raise the question of law, and he was bound to state so much of the pleadings in the Irish action as would raise the question of estoppel by *res judicata*. It is not enough to say that all the questions now raised were raised in the Irish action; he ought to say that such a question was raised in such a way: Rules of Supreme Court, 1883, Order XXV., rule 2; Order XIX., rule 21.

(1) Law Rep. 1 Ch. 108.

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Fischer, in reply:—

The question is whether the issue which it is sought to raise now was fairly raised between the parties in the former action. To determine this question the pleadings in that action must be looked at.

[PEARSON, J.:—The old practice was to refer it to the Master to report whether the former decree was for the same purpose. Why cannot I look at the pleadings myself?

Higgins:—The old practice has been abolished.

PEARSON, J.:—Not where the new rules do not make any provision.]

In *Hunter* v. *Stewart* (1) Lord *Westbury* looked at the pleadings in both the suits and compared them.

[*Higgins* referred to *Robinson* v. *Duleep Singh* (2).]

PEARSON, J.:—I think I ought to look at the Irish pleadings.

Fischer, Q.C., and *Mulligan*, for the Marquis:—

The Irish pleadings shew that the question of rectification was distinctly raised, and there was a decision upon it. Under the Irish *Judicature Act* the Irish Court had jurisdiction to rectify the lease. The judgment involved a decision against *Houstoun* on both points.

[PEARSON, J.:—Suppose he tendered no evidence on the question of rectification?]

Then he could not be entitled to rectification. It is not suggested that any evidence has been discovered since.

[PEARSON, J.:—Would that which would be practically a nonsuit be of the same effect as a judgment in your favour: *Pickett* v. *Loggon* (3)? I am inclined to think that the case of rectification was abandoned.]

Houstoun could have asked leave to amend his pleadings. If he abandoned the point it must be assumed that he had no case. An unsuccessful party will not be allowed to reopen the litigation merely by alleging a new fact going in the same direction as the

(1) 4 D. F. & J. 168. (2) 11 Ch. D. 798.
(3) 14 Ves. 215.

facts upon which he failed before. He must shew some fact which entirely changes the aspect of the case, and also that he could not with reasonable diligence have discovered that fact before: *Phosphate Sewage Company* v. *Molleson* (1).

[PEARSON, J.:—That decision depended on the principle that a party is not allowed to bring his case before the Court piecemeal.]

The judgment in the Irish action declared the title to the land. The question of mistake was distinctly raised, and it was necessary to decide it as the groundwork of the actual decision, and the judgment is binding everywhere, and operates as a *res judicata*: *Story's* Conflict of Laws (2); *Castrique* v. *Imrie* (3); *The Queen* v. *Inhabitants of Hartington* (4); *Outram* v. *Morewood* (5).

Higgins, Q.C., and *R. C. Dobbs*, for the Plaintiff:—

The doctrine of *res judicata* does not apply to concurrent actions; there must have been a judgment in the one action before the other is commenced: *The Delta* (6). Here the Plaintiff raised the question first, and he was defeated by the Defendant going to another Court and managing to snap a judgment first.

At any rate, all the matters which are in controversy in the English action were not adjudicated on in the Irish action. The question of rectification was not in issue in that action, and *Houstoun* was under no obligation to put it in issue then.

Fischer, in reply:—

The Delta does not apply. The actions were commenced within a few days of each other. The Marquis went to the proper tribunal. There was no snapping of a judgment in the Irish action; it was tried first because there happened to be less pressure of business in the Irish Court than in the English. At one time the Plaintiff in the English action abandoned his claim for rectification. The claim was afterwards restored by an amendment of the pleadings, but at that time the judgment in the Irish action had been given.

(1) 4 App. Cas. 801.
(2) 7th Ed. sect. 591, p. 735.
(3) Law Rep. 4 H. L. 414.
(4) 4 E. & B. 780, 794.
(5) 3 East, 346.
(6) 1 P. D. 393, 404.

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PEARSON, J.:—

This case, like many others, raises points of far greater difficulty and importance than the particular facts justify. It is plain that at the time when the writ was issued in the English action there was no *res judicata* in *Ireland;* the whole matter was open between the parties. On the 11th of July, 1884, after the trial before the jury in *Ireland,* Lord *Sligo* obtained leave in the English action to amend his defence, in order that he might set up the verdict which he had obtained in *Ireland,* and on the 15th of July he delivered an amended defence by which he pleaded in apt terms the Irish judgment. On the 19th of July, Mr. *Houstoun* re-amended his statement of claim, and now the matter comes before me on the question whether I ought to stay the proceedings in the English action, on the ground that the whole matter in controversy has been decided by a competent Court in *Ireland,* and that that decision is binding between the parties for all purposes. The contention of the Marquis is, that, under the terms of the lease, the right of shooting over the demised land is reserved to him. Two points were raised and are raised by Mr. *Houstoun*; the one that, according to the terms of the lease, the right of shooting belongs to him; and the other, that, if that is not the proper construction of the lease, the lease ought to be rectified, because it has been by mistake improperly drawn, contrary to the understanding and agreement between the parties. The first point which strikes me is that which was suggested by Mr. *Higgins,* viz., that, inasmuch as a plea of *res judicata* is a plea in bar to the institution of an action, that plea cannot succeed in the present case inasmuch as the judgment in the Irish action did not exist at the time when the writ in the English action was issued. I am rather inclined to think that that view is right, and that I cannot stop the proceedings in this action upon the ground that in the interval between the issue of the writ and the hearing of the present application, judgment has been pronounced in the Irish action. But I am unwilling to decide this case entirely upon that ground, because, however right the decision in *The Delta* may have been under the old practice, I am not satisfied, without a closer examination of the existing Rules of Court, that a defendant is

not now at liberty to set up as *res judicata* a decision of the point at issue by a Court of competent jurisdiction during the progress of the action. I have already said that the pleadings, in my opinion, contain a sufficient reference to the judgment in *Ireland*, and, looking at those statements as if they had been pleas, the first question was whether I could go beyond the statements in the pleadings in order to determine whether the matters in controversy in *Ireland* were the same as the matters in controversy here. I expressed an opinion, and I remain of that opinion, that, inasmuch as under the old practice with regard to a plea of this kind, there would have been a reference to the Master to look into the pleadings in the other suit to see whether the controversy was the same in both the suits, I am now bound myself to look into the pleadings and the judgment in the Irish action in order to determine that question, and accordingly I allowed the pleadings in the Irish action to be brought before me in order that I might judge whether the matters now in controversy have been determined in *Ireland*.

Now, so far as I can see, two points were raised by Mr. *Houstoun* in *Ireland*. One was that there had been no such trespass as alleged, and that depended entirely upon the construction of the lease. The other was that, if there had been a trespass, if the construction of the lease was against him, nevertheless the lease ought to be rectified. As to the first point, I have no doubt that it was decided in favour of the Marquis. But, as to the second point, it is not proved to my satisfaction that it was ever decided by the Irish Court. It may have been, for aught I know; but, upon the materials before me, I am unable to say whether it was decided. Looking at what took place as to the point of law which was reserved at the trial, it seems to me almost impossible that any question with regard to the rectification of the lease could have been either reserved or argued before the Divisional Court. The leave given by the Divisional Court was "To move that the Plaintiff might shew cause why the verdict and judgment had for the Plaintiff at last Hilary sittings of this Court should not be set aside, and the verdict and judgment thereon be entered for the Defendant, pursuant to the leave reserved by the learned Judge who tried this action, or why the verdict for the Plaintiff

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Pearson, J.

should not be set aside and a new trial had, on the ground of the misdirection of the learned Judge." That is the whole of it. That does not suggest that either of the points applied to the rectification of the lease, and I can only say that I am not satisfied that they did. I have been told by counsel that the learned Judge withdrew the question of rectification from the jury altogether. The misdirection complained of (if there was any) must have been with regard to the other part of the case which he did submit to the jury, and upon which the jury gave a verdict. But there is nothing beyond implication to shew that the Court decided that the lease ought not to be rectified, and it may well be that Mr. *Houstoun* did not go into that question, either at the trial or before the Divisional Court, first, because he had this action proceeding in *England*, in which he could have the matter determined; and secondly, because he may have felt that the evidence in support of his case was not sufficient to enable him to win it. Under these circumstances I do not think that I ought to stay the proceedings in this action on the ground that the questions at issue have been decided by a competent Court in *Ireland*, even if I have jurisdiction to do so.

There are two other circumstances which distinguish the present case from previous cases of the kind. In the first place, this is not a case in which the same Plaintiff is bringing two actions before different tribunals. The action in *Ireland* was brought by the Marquis. The action in *England* is by Mr. *Houstoun*, and it seems to me that you cannot apply to such a case the same principle as is applied when two actions are brought by the same plaintiff before different tribunals. In the second place, the subject matter of the contention, upon which I am now asked to stop this action, is absolutely distinct from the case raised by the Plaintiff in the other action. According to the lease as it now stands Mr. *Houstoun* has no answer to the case of the Marquis; still he was perfectly entitled to bring a distinct action to have the lease rectified, and the fact that he has failed to shew that there was no trespass by him as the lease now stands cannot by any means affect his equity, or prejudice his position as plaintiff in an action to have the lease rectified. In my view, therefore, he was not bound to set up the defence of mistake which it

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is alleged that he did set up in the Irish action. He is entitled to have that question decided in a separate action altogether, and although it was shewn as a fact in the Irish action that he had been guilty of trespass, that does not, so far as I can see, in any way affect his position in an action in which he asks for totally different relief, on totally different grounds, and in which the *onus probandi* that the lease was improperly drawn would lie upon him. I must, therefore, refuse this application.

W. L. C.

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The Marquis appealed from this decision on the question of estoppel.

On the 18th of February two affidavits were filed. The first was sworn by one of the Irish solicitors of the Marquis, which stated that in *Ireland* it was the practice in all cases of applications for a new trial or to change a verdict, that the Judge who tried the action should forward to the Registrar of the Divisional Court a report of the trial, and that official copies of such report could then be obtained by the parties for use on the hearing, and on all future proceedings in which it might be required. The deponent then referred to an office copy, which he made an exhibit, of the report of Lord Chief Justice *May* which had been used by the Divisional Court in *Ireland* on the hearing of the motion, which copy he stated to be signed by the proper officer, and to be admissible in all Courts in *Ireland*.

Houstoun, by his defence in the Irish action, had set up the case, that assuming the clause as to the right of sporting to have the effect contended for by the Marquis, it had been inserted in the lease under a mutual mistake, and contrary to the true agreement between the parties, but he had not counterclaimed to have the lease rectified. The object of producing this report was to shew that the question of mistake had been decided in *Ireland*.

The report contained a *résumé* of the evidence given by *Houstoun* in *Dublin*, and concluded as follows:—"I directed a verdict for the Plaintiff upon the construction of the lease of 1883. I considered that there was no evidence that the lease was executed under any mistake, certainly not by Lord *Sligo*, and in effect directed a verdict against the special defence." The second affidavit was sworn by the shorthand writer who took shorthand

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notes of the Lord Chief Baron's judgment in *Dublin* in the Divisional Court. The shorthand writer made an exhibit of a transcript of his notes, and deposed that he himself took the notes of the judgment.

The appeal came on for hearing on the 25th of February, 1885, before Lords Justices *Cotton*, *Bowen*, and *Fry*.

Fischer, Q.C., and *Mulligan*, for the Marquis, in the course of their argument in support of the appeal, proposed to read the report of Chief Justice *May*.

Higgins, Q.C., and *R. C. Dobbs*, for *Houstoun*, objected to its admissibility. They contended that though it was evidence in the Irish Courts for all purposes of the Irish action, it was not evidence in another proceeding.

COTTON, L.J.:—

We are all of opinion that the report is admissible in evidence as to what took place at the trial, whatever its effect may be. The question is, what was decided in *Ireland?* This is a note of the proceedings at the trial drawn up by the presiding Judge for the purpose of being submitted to the Divisional Court on an application for a new trial, and we consider it admissible evidence of what took place before him and what he decided.

Both affidavits with the exhibits were then allowed to be read.

The argument then proceeded, but on the following day an order was made by consent to the following effect:—That all charges and allegations of mistake or fraud should be withdrawn and struck out of the pleadings; that *Houstoun* should be at liberty to proceed with this action on appeal from the decision of Mr. Justice *Pearson* as to the construction of the lease; that the decision of the House of Lords, if obtained in this action, should govern both actions, and that *Houstoun* should pay the Defendant's costs of the present appeal.

Solicitors for Plaintiff: *Roopers & Whately.*
Solicitors for Defendant: *Parkin & Woodhouse.*

H. C. J.

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May 7, 8, 9, 12.
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Feb. 27, 28; *March* 2, 7.

[1882 E. 920.]

False Representation—Company—Issue of Debentures—Misstatement of Object of Loan—Contributory Mistake of Plaintiff.

A misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it.

Where a plaintiff has been induced both by his own mistake and by a material misstatement by the defendant to do an act by which he receives injury, the defendant may be made liable in an action for deceit.

The directors of a company issued a prospectus inviting subscriptions for debentures, and stating that the objects of the issue of debentures were to complete alterations in the buildings of the company, to purchase horses and vans, and to develop the trade of the company. The real object of the loan was to enable the directors to pay off pressing liabilities. The Plaintiff advanced money on some of the debentures under the erroneous belief that the prospectus offered a charge upon the property of the company, and stated in his evidence that he would not have advanced his money but for such belief, but that he also relied upon the statements contained in the prospectus. The company became insolvent:—

Held (affirming the decree of *Denman*, J.), that the misstatement of the objects for which the debentures were issued was a material misstatement of fact, influencing the conduct of the Plaintiff, and rendered the directors liable to an action for deceit, although the Plaintiff was also influenced by his own mistake.

THIS action was brought by the Rev. *Charles Nattali Edgington* against the Hon. *J. T. Fitzmaurice*, Colonel *Rich*, Colonel *Snow*, General *Taylor*, and Major *Clench*, directors of the *Army and Navy Provision Market* (*Limited*), and against Mr. *Hunt*, the secretary, and Mr. *Hanley*, the manager, asking for the repayment by them of a sum of £1500 advanced by the Plaintiff on debentures of the company, on the ground that he was induced to advance the money by the fraudulent misrepresentations of the Defendants.

Early in November, 1880, the Plaintiff, who was a shareholder of the company, received a prospectus or circular which had been issued by order of the directors inviting subscriptions for debenture bonds to the amount of £25,000 with interest at 6 per cent., which contained the following statements:—

"The society purchased for their market, at the price of

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£44,500, the valuable property known as *Newman's Yard*, comprising more than a quarter of an acre, situate in and with a frontage to *Regent Street*. This property is held direct from the Crown under a lease from the Commissioners of Woods and Forests for a term of ninety-nine years from the 5th of April, 1824, at a ground rent of £196 11*s.* 1*d.* and £15 6*s.* 9*d.* yearly in lieu of land tax, and subject to the half yearly payment of £500 in redemption of a mortgage of which £21,500 is outstanding."

The circular further stated that the company had expended on the property £20,679, and in fittings £2943. The objects for which the issue of debentures was made were thus stated:—

"1. To enable the society to complete the present alterations and additions to the buildings and to purchase their own horses and vans, whereby a large saving will be effected in the cost of transport.

"2. To further develop the arrangements at present existing for the direct supply of cheap fish from the coast, which are still in their infancy.

"The changes contemplated in the transport service of the society are the results of past experience, which proves that dealing with contractors is not only expensive but unsatisfactory, for the society being often at their mercy they may almost with impunity horse the vans in such an inefficient manner as to render faulty deliveries unavoidable. With sound horses at the command of the transport department the many evils at present inseparable from employing horses under contract will be prevented.

"The society now consists of upwards of 13,000 members, and since the altered management the numbers have been daily increasing."

The statements in the prospectus were impeached on the following grounds:—

1. That the prospectus was so framed as to lead to the belief that the debentures would be a charge on the property of the company.

2. That the prospectus omitted to refer to a second mortgage for £5000 to Messrs. *Hores & Pattisson* which had been made on the 10th of August, 1880.

3. That the prospectus stated that the property was subject to the half-yearly payment of £500 in redemption of the mortgage for £21,500, but omitted to state that on the 5th of April, 1884, the whole balance of the mortgage which would be then due, namely, £18,000, might be at once called in.

4. That the real object of the issue of debentures was to pay off pressing liabilities of the company, and not to complete the buildings or to purchase horses and vans or to develope the business of the company.

On the 8th of November, 1880, the Plaintiff, supposing that the debentures would be a charge upon the property mentioned in the prospectus, wrote to Mr. *Hunt*, the secretary of the company, asking him whether they would be a first charge on the property.

Mr. *Hunt* replied on the 10th of November, 1880, in a letter in which he said: "The debentures will be a first charge on this property after providing for the interest payable in respect of the existing mortgage for £21,000, the redemption of which is spread over a period of twenty-one years, and it cannot be called in except at the rate of £1000 a year."

The Plaintiff was also informed verbally by Mr. *Hanley*, the general manager, that the debenture holders would have the security of the company's property.

The Plaintiff accordingly took debenture bonds to the amount of £1500. The debentures were delivered to him on the 19th of February, 1881, and were in the form of a covenant by the company to pay to the bearer the amount advanced with interest, and contained no charge on the property of the company.

The company was wound up by an order dated the 22nd of July, 1881, and the assets were not sufficient to pay the debenture holders more than a small dividend.

The Plaintiff claimed repayment of the sum advanced by him with interest, on the ground that it had been obtained from him by the fraudulent misstatements and omissions in the prospectus and the fraudulent misrepresentations of *Hunt* and *Hanley*; or, in the alternative, £2000 damages for non-fulfilment of the agreement to give the Plaintiff a charge on the property; or, in the alternative, repayment of £1500 advanced by the Plaintiff on the promise and representation that it would be secured by deben-

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tures specifically charging it on the property of the company, subject only to a mortgage then existing; whereas the debentures did not specifically charge it on any property, and were made subject to various other charges which were fraudulently concealed from the Plaintiff by the Defendants.

The Defendants appeared separately, but the defences put in by them were substantially the same, namely, that the mortgage for £5000 was a temporary charge only, and was intended to be paid off before the issue of the debentures, and therefore it was not considered necessary to mention it in the prospectus; that they were not aware that the mortgage for £21,500 could be called in in 1884; that they believed, and had fair grounds for believing, that the money raised by the debentures would be expended in the objects stated in the prospectus, and that some part of it was so expended. They also denied that they had given any authority to Messrs. *Hunt* and *Hanley* to represent that the debenture holders would have any charge on the property of the company. Major *Clench* also relied upon the fact that he resigned his office of director on the 12th of August, 1880, although he was present by special invitation at some of the board meetings at which the prospectus was discussed and assisted in drawing it up.

The Plaintiff in his evidence swore that he understood the prospectus as holding out that he would have a charge on the property, and that he would not have taken the debentures unless he had understood that he was to have a charge upon it. He also said that he relied on the fact that the company wanted the money for the objects stated in the prospectus. And he stated that he did not read the bonds when he received them, but only looked at the amounts, and that he did not ascertain their nature till after the company was wound up.

It appeared from the minutes of the board of directors that the company was in financial difficulties at the time when the debentures were issued; their banking account with Messrs. *Ransom, Bouverie, & Co.* being overdrawn to the extent of £5000; that the advance by Messrs. *Hores & Pattisson* had been expended in altering and improving the building in which the company's business was carried on; that a small part of the money raised by the debentures was expended in improving the premises and in the

purchase of horses and vans; but the rest was applied in payment of pressing liabilities, including the mortgage debt of £5000 due to Messrs. *Hores & Pattisson*. Many facts shewing the company to have been in difficulties are stated in the judgment of Mr. Justice *Denman*.

The action came on for hearing before Mr. Justice *Denman* on the 7th of May, 1884.

Sir *F. Herschell*, S.G., *Rigby*, Q.C., and *Willis Bund*, for the Plaintiff.

Davey, Q.C., *W. W. Karslake*, Q.C., and *J. Kaye*, for *Fitzmaurice*:—

A gloss is put upon these documents which they will not bear. The directors did not at the time know that the concern was going to fail, and believed in it, and advanced their own money. Even if the representations in the circular were not true, the Plaintiff must shew that they were deliberately and fraudulently made. But there was no deceit or misrepresentation, and the only ground of complaint is that the Plaintiff has not got what he expected. He says he expected a specific charge on the property, but he must have seen that he got a mere debenture. There was no misrepresentation of any fact, and the directors merely stated their intention as to the money, which of course they might alter. There is every difference between the two: *Maddison* v. *Alderson* (1). Unless it amounts to a contract, a mere statement that you will do something is of no effect: *Jorden* v. *Money* (2); and if it was a contract then it was with the company, and the directors cannot be sued: *Ferguson* v. *Wilson* (3). The circular in no way pledged the directors as to the employment of the money. As to the mortgage, there was no representation that the £21,500 was the only charge, and every one must know that a company owes some debts, and this was merely a temporary loan. The statement as to the mortgage is no doubt inaccurate, but could mislead no one, as every one must know that a mortgage can be called in if default is made in the payments stipulated: *Peek* v. *Gurney* (4). The Plaintiff must prove

(1) 8 App. Cas. 467.
(2) 5 H. L. C. 185.
(3) Law Rep. 2 Ch. 77.
(4) Ibid. 6 H. L. 377.

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an intention to deceive. Mere negligence is not enough: *Cargill* v. *Bower* (1). As to the statements by the secretary and manager, they had no authority to make them, and the directors cannot be held liable: *Weir* v. *Bell* (2).

Crossley, Q.C., *J. Cutler*, *S. Hall*, *A. Young*, *S. Brice*, and *F. A. Lewin*, for other Defendants, cited *Smith* v. *Chadwick* (3); *Arkwright* v. *Newbold* (4); *Eaglesfield* v. *Marquis of Londonderry* (5); *Kennedy* v. *Panama, New Zealand, and Australian Royal Mail Company* (6).

Sir *F. Herschell*, in reply:—

An allegation of intention may be fraudulent: *Ex parte Whittaker* (7). The test is whether the Plaintiff would have taken these debentures unless he had relied on these statements: *Clarke* v. *Dickson* (8); *Kerr* on Fraud (9).

May 12. DENMAN, J. (After referring shortly to the facts of the case and expressing his opinion that no case of contract between the Plaintiff and the company had been shewn, if indeed it was alleged, proceeded):—

I therefore agree with those learned counsel for the several Defendants who have said that this case is substantially, as indeed the Solicitor-General admitted, reduced to, if it ever was more than, an action of, I am sorry to say not a very unusual character. The ground is that the Defendants did make affirmative statements of non-existing facts as facts which statements they knew not to be true, or recklessly stated without knowing or caring to inquire whether they were true or not, by which statements (and this would of course be necessary), or by them materially, the Plaintiff was induced to part with his money, and has sustained damage by parting with his money on securities which turned out to be worthless. Unless all these things are made out the

(1) 10 Ch. D. 502.
(2) 3 Ex. D. 238.
(3) 20 Ch. D. 27.
(4) 17 Ch. D. 301.
(5) 4 Ch. D. 693.
(6) Law Rep. 2 Q. B. 580.
(7) Ibid. 10 Ch. 446.
(8) 6 C. B. (N.S.) 453.
(9) 2nd Ed. p. 35.

action must fail against all or against any of the Defendants against whom they are not made out.

Unfortunately for me, perhaps, I have lately had to look into this part of the law more than once in cases which are not very far from analogous to the present case, and inasmuch as this is really a common law action when put in the way in which it is now put, it is right to formulate as well as I can before dealing with such a case the way in which the questions would have to be put before a jury in order that they might decide whether the cause of action is made out, taking the ruling of points of law from the Judge. Now, in such a case several things would be told to the jury. They would be told that the only way in which persons could be made responsible for fraudulent misstatements in a prospectus would be first that the prospectus contained not a mere statement of a possibility, or of a contingency, or of an intention as to what might occur according to the opinion of the person who is making the statement, but there must be something which amounts in the opinion of the Judge or jury (sometimes it may be for the Judge, and sometimes for the jury; but generally I apprehend this would be for the Judge where it is upon a written document) to a statement of a fact as existing which is not in truth existing. It will not be enough that the Defendants gave a mere loose opinion, because that might be an erroneous opinion, but there must be something which, solidly looked at, is a positive statement of fact. I am putting this, according to my own view of the matter, as a *sine quâ non*. Next it must be proved that that statement was made fraudulently. Then a jury would have the legal meaning of the word "fraudulently" explained to them, and I take it to be now established beyond all question that a statement is in the eye of the law made fraudulently not only if the person who makes it is stating something as the fact which is not the fact—absolutely telling a lie—but less than that suffices in the eye of the law. If persons who have the full means of acquiring knowledge about a particular thing, yet with the intention of inducing other people to spend their money upon that thing, especially on such a venture as a limited company, recklessly, and so to speak, in a gambling spirit, without properly inquiring into the truth or falsehood of the thing,

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without caring sufficiently whether it is true or false, and will or will not mislead people—if such persons wilfully abstain from making inquiries, and make an incorrect statement about the thing without which the money would not have been advanced, then that is in the eye of the law a fraudulent statement as much as if the persons making it had known it to be false. There is, I think, no doubt of the correctness of this doctrine, which was stated in the case of *Peek* v. *Gurney* (1), and has ever since been acted upon by the common law Judges in summing-up to juries. If the statement is one which is false in this sense, that it is so fragmentary and so imperfect as that it must necessarily lead a person to think that to be the case which is not the case, that statement does amount sometimes, and may amount—it would be for the jury, and possibly for the Judge, in particular cases to say whether it does or does not—to a statement fraudulently made within the meaning of those two heads of the definition. Thirdly, a jury would be told that in these cases it must be affirmatively made out that the Plaintiff was materially—not solely, but materially—influenced in the purchase of the thing which turns out to be useless, or in doing the act which turns out to be disastrous by one or more of the statements so made. All those things should be carefully laid down to any jury before they can be left to hold persons liable upon charges such as these. It is an affirmative case for the Plaintiff to make out, and any Court, whether it be a Court of Law or Equity, in deciding cases of this sort ought to give to itself the same cautions and the same directions as to matters of this kind, and as to all that is necessary for the foundations of the actions.

Now with all those conditions before me I have to approach the evidence in this particular case, and except as far as the action is against *Hunt* I think it clear that the Plaintiff's case must stand or fall upon the question whether any or all of these statements in the circular were false, and were made either with knowledge that they were false, or so recklessly as to fall within the rule of fraud arising from that kind of recklessness. As to the Defendants, I may say at once that it is hard to see any reason why any distinction should be drawn between them, saving the cases of

(1) Law Rep. 6 H. L. 377.

Clench and *Hunt*, with whose cases I will deal hereafter. I mean to deal with it as a case in which the question is whether any one of three particular statements, alleged to have been relied on by the Plaintiff, was false, and whether it was false either to the knowledge of the Defendants, or made so recklessly, without care whether it was true or false, as to amount to the same thing. Further, whether it was made in order to induce people to subscribe, and whether in consequence of those statements, or any of them (because one if it did materially induce would be enough), the Plaintiff subscribed his money to the company and whether he did lose his money thereby.

[His Lordship then expressed his opinion that the Plaintiff had not been guilty of laches, and proceeded:—]

Now upon the statements of the circular, I do not think that in cases such as this it is incumbent upon the Court or upon the jury necessarily to look at each statement by itself without regard to the other statements. I think one can easily suggest cases, and that this may be such a case, in which taking one statement separately you might say there is nothing in it, or that there is very little in it, or much less than there is if you couple it with the other two. In all such cases, in considering the animus with which the statement was made, I think it is only common sense that, whether jury or Judge, you should look at the whole of the document together, and consider every statement in it with a view of forming a judgment as to the intention, and that it is not a fair way of dealing with these cases to say, I take statement A., there is nothing in it; I take statement B. there is nothing in it; and I take statement C., there is nothing in it—there is nothing in them if they stood alone, and therefore as you cannot make three nothings into something the whole thing falls to the ground. I think you must take the whole, together with its history, and then, it may be that there is just reason for holding statement A., statement B., and statement C. to be all inaccurate, and all falling within the definition of an actionable false statement. There may be cases in which that is so, though, if you had only one, the decision might be quite the other way as regards that one statement. It is quite certain that you must always take into consideration the surrounding facts of

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the case in construing every document, and not only so, but in considering the animus of the parties who issue that particular document.

I think it is right to run through the history of this company so far as it appears from the documents which were put in evidence in the case, especially the minutes of the meetings of the directors.

[His Lordship then read passages from the minutes of the meetings of the directors, referring to them in many cases on the question whether *Clench*, one of the Defendants was liable. His Lordship was of opinion that in July, 1880, the state of the finances of the company was a matter of considerable anxiety, and that the company was not prosperous. There were frequent meetings, and they owed money to their bankers. In August of that year the mortgage for £5000 was made. In August, 1880, resolutions were passed for spending £110 in repairs, and £150 on horses, and £350 for fish. In September, 1880, a proof of the circular was read at a meeting, so that in his Lordship's opinion this circular was discussed at the same time when there were considerable difficulties as to money. The Defendants certainly advanced their own money, and it was said that this shewed *bona fides* on their part. On the 14th of October the circular was again discussed, and again on the 19th and 28th, in all which time the company was in great difficulties for ready money. The minutes of the subsequent meetings were only important on the question of *bona fides*. At a meeting on the 25th of November there was a resolution to lay out £150 in the purchase of horses, as to which his Lordship rather took the view of the Plaintiff, that it was absurd to suppose that for that sum they would get horses of their own. His Lordship feared that when the circular was issued the intention was to apply the money raised by the debentures in payment of pressing debts. No evidence had been given of the expenditure of the money in any purchase of horses. It appeared that £6575 had been offered, and £5500 had been received by the 1st of December, nearly the whole of which was applied in payment of then existing debts. His Lordship then expressed his regret that the directors had not paid sufficient attention to the advice of their solicitors as to the form of the bond.]

I have been perhaps unnecessarily minute in going through the salient points as they appeared to me, but I have done so because it appears to me that both upon the question of the construction of the document which is impeached, and also upon the question of the conduct of the directors, and whether it can be looked upon as *bonâ fide* in all senses, or as impeachable on the grounds on which it is impeached, it is desirable to look at the surrounding circumstances and at the whole of their conduct. It is impossible to leave out any matter bearing upon the true condition of the company, or bearing upon this circular, without leaving out something which ought legitimately to be taken into account in considering the questions which are before the Court.

Now, having done that, I must look at the document itself. As I have already said, I consider that the action is one founded on this, and this only, as it now stands: it is an allegation by the Plaintiff that the directors were parties to this circular; that they published it; that it contains three specific statements which amount to statements of fact which were inaccurate and misleading and not substantially true; that they at least were most reckless in publishing this document with those statements, looking at either the knowledge they possessed or the knowledge which they did not care to possess; and that the Plaintiff was misled by those statements and was induced thereby, or by one or some of them, to part with his money, and that so he has lost his £1500.

The document is headed "Six per cent. debenture bonds." When I first read these bonds I was myself under the impression, an erroneous impression I find, that there had been in the opinion of Courts something to the effect that there was in the mere word "debenture" something indicating to people that the document was more than a mere promise to pay, and that it amounted to something like a charge upon the property, or the takings, or the profits of the concern. That does not appear to be so, though it is said that through certain expressions of *James*, L.J., in the case of *In re Florence Land and Public Works Company* (1), there had been an impression that the mere use of the word "debenture" did imply something more than in point of law it does imply. I think, however, that it was not a very unlikely thing that the

(1) 10 Ch. D. 530.

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mere title of these bonds might, however erroneously, be supposed by persons in the position of the Plaintiff to be a more important thing than a covenant on the part of the company to pay him principal and interest, with no power on his part, whatever might happen, to seize the property of the company at any intermediate time. But that was an erroneous view, and it is clear that in point of law this is nothing more than a promise to pay under the seal of the company. The document contains, however, certain statements which no doubt must be held to be made for the purpose of inducing people to take these bonds, and they are statements relating at least to the advantages of the company, and if they are not, they are idle and unnecessary and irrelevant statements. If one were to speculate upon the kind of way in which such statements would be discussed at a meeting (and they certainly were discussed at many meetings by the directors, though the directors remember nothing about it), one feels as certain as if one were present at one of these deliberations, that they must have considered what they should insert and what they should not insert in this circular, with reference to how the public or the invited subscribers would look at it. That I think is made more certain by the minutes, which shew how often the matter did come before the board, and how all the Defendants must have had it before them from time to time, and how very important it was at the time at which those discussions took place that they should get the money.

[His Lordship then read the first paragraph of the circular, as to which there was no complaint. But as to the statements with respect to the mortgages, his Lordship held that this would be of great importance, and that as the circular stated what the charges were, that amounted to a statement that there were no other charges, whereas there was the mortgage for £5000.]

If so, then the case seems to fall expressly within the language which was used in *Peek* v. *Gurney* (1), and which was referred to by the late Master of the Rolls in *Smith* v. *Chadwick* (2). It is said in answer that they contemplated that the £5000 would be soon paid off. Suppose they had said, "subject also to a mortgage to Messrs. *Hores & Pattisson*, of which so many thousand pounds

(1) Law Rep. 6 H. L. 377. (2) 20 Ch. D. 58.

are still due and which we intend to be paid immediately out of these debenture bonds." How can one for a moment say that that is not a matter which might most seriously have entered into the consideration of a person who was subscribing money upon such bonds as these? If so, is not that statement, put in that way, fragmentary, misleading and imperfect, condescending to a particular which makes it all the more misleading? Is it not a reckless and a gambling statement in the mere hope that at some time, if they get sufficient money for these debentures, they may clear this debt away? Is it not a matter which in all frankness and truthfulness ought to have been stated, and which was deliberately not stated with a view of making the prospects more taking to those who would be thinking of advancing money to the company? My view is that it is an important omission amounting to a misstatement, and therefore if the Plaintiff was materially induced by that non-statement to take the debenture bonds, I think he would have a right to complain, and if he suffered by it, to recover his money back against any person who had recklessly led him astray by that kind of statement.

Then, was the Plaintiff induced by that statement to take the bonds? He does not expressly say he was induced partly by that statement. I do not think his words amount exactly to that. But upon examination, and upon cross-examination, though he does say that if he had thought that this document did not give a charge upon the property he should not have had anything to do with it, he said, "If it had been stated to me that there was a second mortgage on this property beyond the £21,500 which had not been paid, and the object of the debenture was at once to be urgently gathering up the money for the purpose of paying that particular mortgage, then I should have had nothing to do with the concern." Now, it is for a jury, or any tribunal that has to draw inferences of fact, to say whether with that evidence, and looking at the materiality of the thing, that is a matter which did tend materially to induce the Plaintiff to take the debentures in question, by which he has lost money. He says that he thought sufficiently of the importance of the thing to go to the secretary and ask the secretary whether this would be a first charge, and the secretary solemnly assured him it would. It shews that he

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felt it of importance, and he does say that if he had the least notion that there was this second mortgage, he should not have taken the property. I think, therefore, it was a thing which did go materially to induce him to take the debenture bonds, and in that sense also I think it was a statement of fact. That being so, I think that on that ground alone he would be entitled to relief. But, as I said before, I do not think it necessary to say what, supposing that had been the only misstatement, the Court might have done, because I think that each of the statements and the whole of the documents are to be looked upon together. But I do hold that even if it stood upon this alone, looking at the opinion of the Lord Chancellor in *Peek* v. *Gurney* (1) and the opinion of the Master of the Rolls in *Smith* v. *Chadwick* (2), where he comments on the Lord Chancellor's judgment, there was a partial and fragmentary statement, calculated to deceive, and that it was a thoroughly misleading statement, though in the shape of a non-statement, and that the parties are responsible.

[His Lordship then expressed his opinion that the statements as to the half-yearly payments of £500, and as to the power of calling in the balance of the mortgage for £21,500, did not shew that it might be called in at the end of four years.] I think that this is so important a matter that it clearly is most material; that it ought to have been stated; and that, not being stated, it is a matter which makes this prospectus substantially incorrect.

But mere inaccuracy will not affect the matter. This is a case in which the action is brought for fraud. Fraud, however, as I have said, may be committed by reckless representations made without knowing how the matter stands one way or the other. Then, does this fall within that doctrine. Upon the whole, though not so confidently as I hold upon the other matter, I think it does. I think that where five or six directors are constantly attending at meetings, constantly discussing how they can obtain advances, what mortgages they can get, who will deal with them, and whether they shall raise debentures in a particular form from persons, shareholders or otherwise of the company, it is their bounden duty, before they send out a document such as this, to inquire and to know for certain what is the effect of the

(1) Law Rep. 6 H. L. 377. (2) 20 Ch. D. 58.

document as to a matter so plain and important. The Plaintiff says that if he had known that the mortgage was liable to be called in in four years, and that in the last year such a sum as £18,000 was to be at once called in, he would not have thought of lending his money to the society. And, though I think that this is not quite so clear a point as the other, I do think it is sufficiently clear, and on that ground also the Plaintiff has a right to say that he has been taken in and misled, and that he has been deceived by reckless statements of a gambling character made by persons who had no right to be so sanguine as they were, with such difficulties about them as at that time were existing, and that on that ground also he is entitled to maintain this action.

Then there is a third point. [His Lordship then read the statement as to the objects of the issue, and expressed his opinion that the intention was to tell people that the purchase of horses and carts was very important to the company, whereas there was no real expectation or intention of so laying out the money, though if all had gone on well it might at some future time have been done.] This, therefore, was illusory and misleading. Nor did it appear that anything was done as to the supply of fish. With regard to the alterations in the buildings the only evidence we have is of very slight and trifling alterations. It would have been easy of proof if there was anything serious expended, or likely to be expended. It does strike me, therefore, that these objects were inserted merely in this way. "The persons who are about to subscribe will require us to say why we want this enormous issue of debenture capital. If we have this valuable property, if we are going on so prosperously, if we have 13,000 members, and the numbers are daily increasing; if we have no other mortgage than the mortgage mentioned in the circular, which is not to be paid off for twenty-one and a half years, people will say why are you coming to us to ask for £25,000 additional capital?" And it being seen that this would be asked, the directors felt that unless they put in some statement which would make people comfortable and satisfied as to the objects of the issue of the debentures, they would not get subscribers."

Does that amount to a false statement? Is it a statement

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calculated to mislead to such an extent, and is it within the law a statement of a kind, liable to be considered a fraudulent statement in an action for fraud against an individual. Here many points are made. One point is that it does not state facts, but that it states intentions of the mind, and on that ground it is said, it is not sufficient. Another is, that it is a mere statement of intention which does not amount to any guarantee or contract to do it, and that it might be altered at any time; that it is not a matter with which the persons lending the money would have any concern; and it is also seriously argued that it was solidly and substantially true. I think myself that there is some doubt about what might be the law applicable to this kind of statement. I had to consider it very recently with my Brother *Manisty* in a case in the Queen's Bench Division of *Bellairs* v. *Tucker* (1). It was a different case in many respects, but there was a statement in the prospectus which was issued by the defendants in the case that it was believed that a certain French company would be successful in substance because of the success of an English company. The English company had only very recently been established, and I think both my Brother *Manisty* and myself had considerable doubt whether there was any dishonesty, and whether the statement of success was not a statement of a mere matter of opinion. But then the prospectus went on to say "which English company having only been started eighteen months has already entered into a contract which will have a certain effect." We had the whole matter before us, and we thought that looking to the history of the matter, and looking at the evidence in the case, this was not a statement of a fact as existing which was non-existent. But whether we were right or not, that case appears to me to be very different from the present, because the decision in that case went on the particular facts of the case and the circumstances of those particular companies. I think that in every one of these cases it will be found that it is a very dangerous rule to take a decision in one case as a precedent, on account of the great variety of facts with regard to the conduct of directors in different companies.

But looking at the facts of the present case and at the sur-

(1) 13 Q. B. D. 562.

rounding circumstances, is this statement: "The objects of the present issue are" a false statement of a fact existing which did not exist? If it is not, then I should say the Plaintiff would have no right to rely on it. But upon the whole I think it is. It has not been directly held in any of the cases cited that if the thing stated to exist is an intention of the mind that may not be a statement of fact which is obviously and certainly false.

It was said that it is idle and absurd to suppose that so small a sum as £7000 or £8000 would have had that effect, and that if they had got the whole £25,000 then they might set to work to perform these objects. But I think that cannot be said towards any individual subscriber of the bonds. When you tell me that the objects of this issue are to enable you to complete present alterations, to purchase horses and vans, and to further develope the supply of cheap fish from the coast, that is telling me in so many words, not only that such objects are in your mind, but that if I give you so much money towards that, or if 100 other subscribers give you the whole or part of the £25,000, you are able with reasonable certainty to employ any money subscribed on the faith of your words in doing the things which you tell me it is your object by this issue to obtain. The Lord Justice *Mellish*, in *Ex parte Whittaker* (1) says, that if it were clearly made out that at the time there was no intention to pay he should consider that a case of fraudulent misrepresentation had been shewn. I think that this statement, if not substantially false, is, looking at the whole of the case, a most reckless statement, one shewing an amount of sanguineness which, if really entertained, was under the circumstances, as against people who are asked to advance their money, of the most gambling and speculative character, and on that ground also the Plaintiff is entitled to recover.

I have already stated that I think Major *Clench* who played a leading part in very many of these transactions is quite as liable as the other directors. I feel very sorry for Colonel *Snow*, because at one period he seems to have protested against that which I think was very wrong as regards some of the statements they were making to the subscribers. Still, with his eyes open, he was a party to the prospectus, and the Plaintiff ought not to be

(1) Law Rep. 10 Ch. 446.

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deprived of such security as he may get from a judgment against Colonel *Snow* as well as against the others. [His Lordship then considered the case against *Hunt*, coming to the conclusion that he was merely a servant of the company and was not liable, nor was *Hanley*. His Lordship gave judgment against the five directors for £1500 less £45 received as interest on the debentures. As against *Hunt* and *Hanley* he dismissed the action, but without costs, as they ought to have been mere cautious.]

C. M.

C. A.

From this judgment the Defendants *Fitzmaurice*, *Rich*, *Snow*, *Taylor*, and *Clench* appealed. The appeal came on for hearing on the 27th of February, 1885.

Davey, Q.C., *Crossley*, Q.C., and *A. Young*, for the Appellants:—

The first ground of complaint put forth in the pleadings, namely, that the prospectus was so framed as to lead the public to believe that the holders of debentures would have a charge upon the property of the company, has been virtually given up. The Plaintiff's expectation of having such a charge was simply his own mistake, assisted, it may be, by the unauthorized statements of the secretary and manager, for which the company are not responsible. And if there had been anything in the circular to lead to that expectation, the Plaintiff's remedy would have been an action for specific performance of the contract for a charge, not an action for deceit.

In order to maintain this action the Plaintiff must shew not only that the statements made by the Defendants were false, but that they were false to their knowledge, and that he was induced by those statements to advance his money.

With respect to the omission of the mortgage to *Hores & Pattisson* for £5000, our answer is, that the circular did not profess to state all the liabilities to which the company's property was liable. It was only intended to shew the condition and value of the property when they bought it. As the directors were not offering a charge on the property, there was no reason for them to set out all the incumbrances on it. The £5000 advance was only a temporary loan, which was expended on the improvement

of the property, and was to be paid off in a few months. The mere omission of a fact in a statement will not sustain an action for deceit: *Arkwright* v. *Newbold* (1).

With respect to the statement as to the first mortgage, the directors have sworn that they were themselves ignorant of the exact terms of it, and supposed that the whole was to be paid off by instalments. The property was bought subject to the mortgage, and the mortgage deed was not in their possession. There is no evidence of any intention to deceive the public, nor could the misstatement have any effect on those who were willing to advance money. The Plaintiff says that he relied upon the debentures giving him a charge. If so, the alleged misstatement was immaterial to him; he knew that he took subject to the first mortgage, and it made no difference in what way it was to be paid off.

The last point relied on by the Plaintiff is the misstatement as to the object for which the loan was required. In the first place, the directors had a *bonâ fide* intention at the time of expending the money, or a substantial part of it, in the way proposed. The evidence clearly shews that they were sanguine as to the ultimate success of the concern. And they did in fact apply some of it in this way. Moreover, the loan from *Hores & Pattisson* had been expended in the improvement of the property, and therefore paying off that loan was practically an employment of the money in the way proposed.

But, secondly, the Plaintiff was not misled by this statement, whether it was inaccurate or not. He says himself that he was induced to lend his money by the belief that he would have a charge on the property, and this is admitted to be a mistake. So that it was his own mistake that misled him, and therefore the statements of the circular as to the objects in which the money was to be employed were immaterial: *Smith* v. *Chadwick* (2). There was nothing more than an expression of intention on the directors' part as to the application of the money. That is not such a representation as can be a ground for an action of deceit: *Jorden* v. *Money* (3); *Maddison* v. *Alderson* (4).

(1) 17 Ch. D. 301.
(2) 9 App. Cas. 187.
(3) 5 H. L. C. 185.
(4) 8 App. Cas. 467.

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Sir *F. Herschell*, S.G., *Rigby*, Q.C., and *Willis Bund*, for the Plaintiff:—

The statement, which is now admitted to be untrue, as to the first mortgage, and the omission of mention of the second mortgage were not immaterial. The Plaintiff expected to have not only a charge, but a first charge, subject only to the payment of the £500 instalments of the first mortgage. He would not have advanced his money if he had known that the property was so heavily charged. It is contended that the objects for which the money was required were immaterial. This is a fallacy. Whether the Plaintiff expected to have a charge or not, it made a great difference whether the company was in a position to expend the money raised in improving its premises and developing its business, or would have to spend the greatest part in paying off pressing liabilities. In fact, as the directors well knew, the company was in financial difficulties, and the money was really wanted to relieve them from pressing liabilities. The intention with which the directors raised the loan is a matter of fact, which can be ascertained by evidence; and it is clear from the evidence, and was so found by the Judge at the trial, that they did not really issue the debentures for the purpose of improving their buildings—that in fact a very small part, under £150, was spent in this manner. Then it is said that if it was a misstatement it did not affect the Plaintiff, because he was deceived by his own mistake. But if a man is influenced in his conduct by the misstatement of the defendant the defendant is not relieved from liability because the plaintiff may have also himself made a mistake. If the defendant's misrepresentation contributed to his conduct the defendant is liable for it.

Davey, in reply.

COTTON, L.J.:—

This case has been very fully and ably argued. It is what is called an action of deceit, the Plaintiff alleging that statements were made by the Defendants which were untrue, and that he had acted on the faith of those statements so as to incur damage for which the Defendants are liable. In order to sustain such an

action the Plaintiff must shew that the Defendants intended that people should act on the statements, that the statements are untrue in fact, and that the Defendants knew them to be untrue, or made them under such circumstances that the Court must conclude that they were careless whether they were true or not. The statements in question were made in a prospectus or circular issued by the Defendants for the purpose of getting subscribers to a loan, and the Plaintiff alleges that he understood from them that the advances were to be secured by a mortgage on leasehold property of the company. In my opinion there was no good ground for his so believing. There was nothing in the prospectus to lead him to such a conclusion. The debentures were merely bonds, and the Plaintiff made no objection to their form at the time when he received them. Therefore if the question had rested on that alone there could be no difficulty. But it does not end there. The Plaintiff also complains that the circular referred to one mortgage, and stated that it was to be paid off by half-yearly instalments of £500, but did not state that the mortgage money could be demanded in a lump sum in a few years; and further, that it omitted to state another mortgage for £5000, which was not to be paid off by instalments, but was payable in two months. I do not think it necessary to go into the consideration of these statements. As regards the first mortgage the Defendants say that they had reasonable grounds for making the statement which they made, and as to the second mortgage they say that they did not mean to imply that there was no other mortgage affecting the company's property. But it is not necessary to give any decision respecting these statements, because, giving credit to the Defendants for having made them fairly, there are other statements which follow, which, in my opinion, cannot be justified. I allude to statements respecting the objects for which the loan was effected:—[His Lordship read the passage from the prospectus in which the objects of the issue of the debentures were stated, and proceeded:—] It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the Defendants liable to the Plaintiff. I agree that it was a statement of intention, but it is nevertheless a statement of fact, and if it could not be fairly said

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that the objects of the issue of the debentures were those which were stated in the prospectus the Defendants were stating a fact which was not true; and if they knew that it was not true, or made it recklessly, not caring whether it was true or not, they would be liable. Did the Defendants know or believe that the company was in a flourishing condition? I think they must have thought that it would turn out well and that the loan could be paid back, for they had shewn their confidence in the company by advancing money of their own. But the question is whether they did not make a statement of a fact which was not correct, and which they knew to be not correct when they stated the objects for which the loan was asked. I do not say that it was necessary to shew that they intended that all the money raised should be applied in carrying out those particular objects, but certainly they ought to shew that it was to be spent in improving the property and business of the company. What is the fact? The financial state of the company was openly discussed at the board meetings, at which the Defendants were all present, and it is clear that they were in great financial difficulties at the time. Although I should not, as I have said, have held the Defendants liable merely for not referring to the second mortgage in the prospectus, yet the existence of that mortgage was strong evidence of their financial difficulties; and, considering all the other evidence, and the admissions of the Defendants in their cross-examination, I cannot doubt that the real object of the issue of debentures was to meet the pressing liabilities of the company and not to improve the property or develope the business of the company. I cannot but come to the conclusion that however hopeful the directors may have been of the ultimate success of the company, this statement was such as ought not to have been made. It was said, How could those who advanced the money have relied on this statement as material? I think it was material. A man who lends money reasonably wishes to know for what purpose it is borrowed, and he is more willing to advance it if he knows that it is not wanted to pay off liabilities already incurred.

But it was urged by the counsel for the Appellants that the Plaintiff himself stated that he would not have taken the debentures unless he had thought they were a charge upon the property,

and that it was this mistaken notion which really induced the Plaintiff to advance his money. In my opinion this argument does not assist the Defendants if the Plaintiff really acted on the statement in the prospectus. It is true that if he had not supposed he would have a charge he would not have taken the debentures; but if he also relied on the misstatement in the prospectus, his loss none the less resulted from that misstatement. It is not necessary to shew that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the Defendants will be still liable. Did he act upon that misstatement? He states distinctly in his evidence that he did rely on the Defendants' statements, and the learned Judge found, as a fact, that he did, and it would be wrong for this Court, without seeing or hearing the witness, to reverse that finding of the Judge. We must therefore come to the conclusion that the statements in the prospectus as to the objects of the issue of the debentures were false in fact, and were relied upon by the Plaintiff.

With respect to the Defendant *Clench*, we are not called on to express an opinion on the points in which his case differs from that of the other directors. I am not influenced by the misstatement as to the mortgage. The point on which I rely is the misstatement as to the objects of the loan, in which the Defendants all joined, and for which they are all equally responsible.

The judgment must be affirmed.

BOWEN, L.J.:—

This is an action for deceit, in which the Plaintiff complains that he was induced to take certain debentures by the misrepresentations of the Defendants, and that he sustained damage thereby. The loss which the Plaintiff sustained is not disputed. In order to sustain his action he must first prove that there was a statement as to facts which was false; and secondly, that it was false to the knowledge of the Defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to

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make a statement recklessly for the purpose of influencing another person is dishonest. It is also clear that it is wholly immaterial with what object the lie is told. That is laid down in Lord *Blackburn's* judgment in *Smith* v. *Chadwick* (1), but it is material that the defendant should intend that it should be relied on by the person to whom he makes it. But, lastly, when you have proved that the statement was false, you must further shew that the plaintiff has acted upon it and has sustained damage by so doing: you must shew that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting. So the law is laid down in *Clarke* v. *Dickson* (2), and that is the law which we have now to apply.

The alleged misrepresentations were three. First, it was said that the prospectus contained an implied allegation that the mortgage for £21,500 could not be called in at once, but was payable by instalments. I think that upon a fair construction of the prospectus it does so allege; and therefore that the prospectus must be taken to have contained an untrue statement on that point; but it does not appear to me clear that the statement was fraudulently made by the Defendants. It is therefore immaterial to consider whether the Plaintiff was induced to act as he did by that statement.

Secondly, it is said that the prospectus contains an implied allegation that there was no other mortgage affecting the property except the mortgage stated therein. I think there was such an implied allegation, but I think it is not brought home to the Defendants that it was made dishonestly; accordingly, although the Plaintiff may have been damnified by the weight which he gave to the allegation, he cannot rely on it in this action: for in an action of deceit the Plaintiff must prove dishonesty. Therefore if the case had rested on these two allegations alone, I think it would be too uncertain to entitle the Plaintiff to succeed.

But when we come to the third alleged misstatement I feel that the Plaintiff's case is made out. I mean the statement of the objects for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develope the supply of fish.

(1) 9 App. Cas. 201. (2) 6 C. B. (N.S.) 453.

A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact. Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the Defendants in raising the money were not those stated in the circular. I will not go through the evidence, but looking only to the cross-examination of the Defendants, I am satisfied that the objects for which the loan was wanted were misstated by the Defendants, I will not say knowingly, but so recklessly as to be fraudulent in the eye of the law.

Then the question remains—Did this misstatement contribute to induce the Plaintiff to advance his money. Mr. *Davey's* argument has not convinced me that they did not. He contended that the Plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact. I have felt some difficulty about the pleadings, because in the statement of claim this point is not clearly put forward, and I had some doubt whether this contention as to the third misstatement was not an afterthought. But the balance of my judgment is weighed down by the probability of the case. What is the first question which a man asks when he advances money? It is, what is it wanted for? Therefore I think that the statement is material, and that the Plaintiff would be unlike the rest of his race if he was not

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influenced by the statement of the objects for which the loan was required. The learned Judge in the Court below came to the conclusion that the misstatement did influence him, and I think he came to a right conclusion.

FRY, L.J.:—

I am of the same opinion. I do not think it necessary to refer to the two alleged misstatements as to the mortgages, because I do not rely on that portion of the case. But with respect to the statement of the objects for which the debentures were issued, I have come to the conclusion that there was a misstatement of fact, that the statement contained in the circular was false in fact and false to the knowledge of the Defendants. Was the statement true in fact? The circular was adopted at a meeting of the board when all the Defendants were present. The financial state of the company was considered. They owed £5000 to their bankers, and £5000 to *Hores & Pattisson*. They owed large sums to tradesmen and other persons. They were under an obligation to pay £3500 in instalments on the mortgage for £21,500 before April, 1884, and they knew that if they did not pay the instalments, the whole would be called in. The necessity of raising money must have been discussed at the meeting. It is clear that their object in raising the money was to meet their pressing liabilities. But the Defendants say that the mortgage for £5000 to *Hores & Pattisson* was only a temporary loan, and that the greater part of it was expended in alterations and additions to the buildings, and therefore the mortgage was merely an anticipation of the loan for the objects stated in the prospectus. But the statement in the prospectus was that a large sum of money had been already expended in improving the building (and that included the greater part of the advance by *Hores & Pattisson*), and that the directors intended to apply the money raised by the debentures in further improving the buildings. This statement was therefore false.

It is not necessary to call attention to the evidence, that the Defendants knew at the time that a large proportion of the loan would have to be expended in paying pressing liabilities. It is hardly denied by the Defendants. I come, therefore. to the

conclusion, with regret, that this false statement was not only false in fact, but was false to the knowledge of the Defendants.

The next inquiry is whether this statement materially affected the conduct of the Plaintiff in advancing his money. He has sworn that it did, and the learned Judge who tried the action has believed him. On such a point I should not like to differ from the Judge who tried the action, even though I were not myself convinced, but in this case the natural inference from the facts is in accordance with the Judge's conclusion. The prospectus was intended to influence the mind of the reader. Then this question has been raised: the Plaintiff admits that he was induced to make the advance not merely by this false statement, but by the belief that the debentures would give him a charge on the company's property, and it is admitted that this was a mistake of the Plaintiff. Therefore it is said that the Plaintiff was the author of his own injury. It is quite true that the Plaintiff was influenced by his own mistake, but that does not benefit the Defendants' case. The Plaintiff says: I had two inducements, one my own mistake, the other the false statement of the Defendants. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced the Plaintiff, the Defendants are liable, even though the Plaintiff may have been also influenced by other motives. I think, therefore, the Defendants must be held liable. The appeal must therefore be dismissed.

Solicitors: *Markby, Stewart & Co.; Crowdy, Son, & Tarry; Last & Sons; J. Holmes; Lewin & Co.; A. E. Copp.*

M. W.

C. A.

1885

PEARSON, J.

Feb. 7.

C. A.

March 12, 13.

POWELL *v.* COBB.

[1884 P. 2114.]

Practice—Venue—Mode of Trial—Rules of Supreme Court, 1883, *Order* XXXVI., *r.* 1.

The Plaintiff in an action to set aside deeds on the ground of fraud, named *Cardigan* as the place of trial in his statement of claim. On motion by a Defendant before issue joined, the Court ordered the action to be tried in the Chancery Division without a jury, and this decision was affirmed by the Court of Appeal.

IN the year 1878 certain real estates in the counties of *Cardigan* and *Brecon* stood limited to *George E. J. Powell* for life, with remainders to his children in tail, with remainder to the Plaintiff for life. During the years 1878, 1879, and 1880, the Plaintiff obtained advances from the three first Defendants on the record, *H. P. Cobb*, *J. T. Peacock*, and *George F. W. Powell* severally, and executed deeds charging his life estate in their favour. And in December, 1881, the Plaintiff assigned his reversionary life estate, subject to the charges in favour of the Defendants *Cobb* and *G. F. W. Powell*, to the Defendant *Peacock*, by way of absolute sale.

George E. J. Powell died without issue on the 17th of October, 1882, and the Plaintiff threatened proceedings to set aside the mortgages and the sale, but ultimately came to terms with *Peacock*, *Cobb*, and *G. F. W. Powell*, and on the 3rd of April, 1883, the Plaintiff executed a release to the Defendants *Peacock* and *Cobb* of all actions, claims, and demands in respect of the sale of his reversionary interest, and the charges thereon. On the same day a complicated deed of arrangement was executed between the Defendant *Cobb* of the first part, the Defendant *G. F. W. Powell* of the second part, the Defendant *Peacock* of the third part, the Plaintiff of the fourth part, and the Defendant *Cobb* and one *W. F. Gush* (as trustees and receivers) of the fifth part, by which the Defendant *Peacock*, in consideration of an annuity, gave up his absolute right to the Plaintiff's life estate, and the parties of the fifth part were appointed receivers and trustees to

keep down certain annuities, to pay premiums on policies for the benefit of the mortgagees, to pay the Defendant *Peacock* an annuity of £2000 a year, and to pay the balance of the rents, if any, to the Plaintiff's wife for her separate use, and after her death in the Plaintiff's lifetime to apply the same as therein mentioned. The Plaintiff by his statement of claim charged the Defendants *Cobb* and *Peacock* with fraud in the transactions and with concealment of material facts, and claimed to have the deeds of release and receivership and trust set aside, and to have the other deeds executed by him stand as security only for the moneys actually advanced to him with simple interest, and redemption.

Cardigan was named in the statement of claim as the place of trial. The Defendant *Peacock* delivered his statement of defence on the 23rd of January, 1885. Issue had not been joined.

This was an application on behalf of the Defendant *Peacock*, that the action should be tried before a Judge without a jury in *Middlesex*, or if the Court should be of opinion that the action ought not to be tried by a Judge without a jury then that the same might be tried by a Judge with a jury in *Middlesex*. There was an affidavit in support of the application, that the parties chiefly resided in *London* and *Middlesex*, that upwards of twenty witnesses, several of whom were actuaries resident in *London*, would be required for the defence, that most of the witnesses for the defence resided in *London* and other places away from *Cardiganshire*, and that some witnesses who had made affidavits for the Plaintiff in the matter resided in *London* and away from *Cardiganshire*. On behalf of the Plaintiff there was an affidavit that it would be necessary for him to call a considerable number of local witnesses.

The motion was heard before Mr. Justice *Pearson* on the 7th of February, 1885.

Cozens-Hardy, Q.C., *Northmore Lawrence*, and *B. F. Williams*, for the applicant:—

This is an action which from its nature ought to be dealt with in the Chancery Division and by a Chancery Judge. The circumstances of the parties and witnesses make it expedient that it should be tried in *London*; therefore it is a case in which the discretion of the Judge ought to be exercised to change the venue:

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Cardinall v. *Cardinall* (1); *Green* v. *Bennett* (2). This is the proper time to apply: if the application had been delayed it might have been too late: *Philips* v. *Beale* (3).

Cookson, Q.C., and *Willis Bund*, for the Plaintiff:—

This application is premature; such an application ought not to be made before notice of trial has been given; Order XXXVI., rules 7 and 11. And it does not follow that the trial will take place at *Cardigan* or before a jury. There are issues of fact which should be dealt with by a jury.

The Plaintiff under Order XXXVI., rule 1, has a right to have the trial where he pleases, subject to the power of the Court for sufficient reason to order otherwise. The Court will not lightly overrule the Plaintiff's option: *Philips* v. *Beale*. This is an action which would more fairly be tried in the country where the witnesses who will have to speak to the circumstances live, instead of bringing them up to *London*.

Davey, Q.C., and *F. T. Procter*, for the Defendant *Cobb*.

Rawlins, for the Defendant *George Powell*.

Baines, for the Plaintiff's wife and infant children.

Renshaw, for trustees.

PEARSON, J.:—

This is an application by the Defendants to change the venue. A preliminary objection is taken that the application is made at the wrong time. It appears to me that the Plaintiff on delivering his statement of claim mentioned *Cardigan* as the place where the trial was to take place. I am told on the one side that the pleadings are not all closed. I am told on the other side that they are all closed, but this at all events I understand is agreed between the parties, that issue is not joined between the parties yet. I need not go further than that, both parties being agreed that joining issue in a case of this kind is more or less formal.

(1) 25 Ch. D. 772. (2) 32 W. R. 848.
(3) 26 Ch. D. 621.

It is simply that both parties say they are now ready for trial. In the meantime as soon as ever issue is joined, the parties will have to be ready for trial whenever the case is to be tried.

Now the first thing that strikes one is this: that inasmuch as the Plaintiff has chosen *Cardigan* in his statement of claim as the place where the action is to be tried, according to my view of the Orders the Plaintiff cannot change that now. It is not open to him to say, having once given notice of trial, I will change that notice of trial at my own will and pleasure. I understand that the order is plain, that the plaintiff when he delivers his statement of claim selects his venue. He may do that within six days after the appearance by the defendant has been entered. I see no *locus pœnitentiæ* given to him after he has once made his election. If both parties agree, I do not doubt that both parties might come to the Court and get from the Court an order changing the venue; but even in that case the Court would have to exercise a certain discretion, and at the present moment if I were asked (both parties agreeing) to direct that the action should be tried before a Judge in *Middlesex*, by which I do not mean a Judge sitting in the Chancery Division, I doubt very much whether I have power to make such an order; I rather think the Orders carefully guard against the Judges sitting in *Middlesex* being overwhelmed by cases being sent to them, simply because it is more convenient than trying them in the country.

The next observation to be made is this, that it has been decided in the Court of Appeal, and is now beyond dispute, that although this is an action properly assigned to the Chancery Division, the Plaintiff has a right in the first instance to select the place of trial. But subject to this, that the Judge may, and must, if application is made to him, exercise a discretion as to whether or not the case is a proper one to be tried elsewhere than in the Chancery Division of the High Court of Justice. I do not myself entirely understand why when the Legislature carefully said that certain cases were to be assigned specially to the Chancery Division of the High Court, and could not be taken in the Queen's Bench Division, the Court should have said this, that notwithstanding that, it should be at the option of

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the plaintiffs not to have them tried in the Chancery Division. However, so the rule is laid down, and I must be guided by it.

Now in the case of *Philips* v. *Beale* (1), Lord Justice *Baggallay* based his decision in a great measure on the ground that the application was made too late, but he also added: "And the defendant has shewn no ground for changing the venue," Lord Justice *Cotton* says the same thing: "I can see no good ground for changing the venue." Lord Justice *Lindley* says: "The plaintiff has, therefore, the right to place the venue where he pleases, subject to the order of the Court if it should think it expedient to change the venue. In this case the Vice-Chancellor has not based his order on convenience or the place of residence of the witnesses, but has changed the venue because the action is one which is attached to the Chancery Division. In my opinion that is not a sufficient reason for changing the venue, and is opposed to the provisions of Order XXXVI., rule 1." I am, therefore, bound to see whether or not, under all the circumstances and from the nature of the case, this is a case which ought to go down for trial at *Cardigan*, or whether it ought to be retained in the Chancery Division. The first thing that strikes me when I look at this claim is that every part of it relates to equitable relief to be administered in this Court, and which could not be got in the Queen's Bench Division of the High Court, and which, as I can see from the nature of the action, is peculiarly suitable to be tried in the Chancery Division. Nor is there on the claim itself a single issue suggested which could be stated to a jury and upon which the verdict of the jury would decide aye or no. There must be a great number of ingredients to determine whether or not the indentures, the subject of the action, can be set aside at all, and if so to what extent they must be set aside. All those are matters upon which many equitable doctrines may come in, and which to my mind make a Chancery Judge the proper tribunal before whom the action should be tried.

Then I come to the question of expense. It is said on the one side the Plaintiff is a poor man, and it will be expensive for him to bring his witnesses to *London*, and it is suggested that it will not be tried at the proper time; that the Defendants are rich

(1) 26 Ch. D. 621, 622, 623.

men and can afford to bring up their witnesses, and, therefore, they will have a great advantage over him. That is stated exceedingly indefinitely. The only allegation on the part of the Plaintiff is, that there must be a considerable number of local witnesses; I do not know what "a considerable number" means. He does not state whether he has *London* witnesses, whereas I am told that on the other side there must be *London* witnesses, and *London* witnesses of a class whose services must be exceedingly costly if they are taken to *Cardigan*.

With regard to bringing the witnesses to *London*, the evidence, although not entirely satisfactory to my mind as regards expense, leaves me no doubt that the difference of expense between taking the witnesses to *Cardiganshire* and bringing the witnesses to *London* will not be so large as might be thought. It must be so, I agree, to a certain extent, but to my mind the difference of expense will be small, and as to the suggestion of its not being heard *de die in diem*, that I cannot say anything about, because if it is transferred to Mr. Justice *North*, as it may very possibly be, it will be heard *de die in diem*.

Taking all these matters into consideration, I think the balance of convenience, having regard to the special nature of the case, is that this case should be kept in *London*, and I shall, therefore, desire the case to be kept as assigned to this Court.

D. P.

The Plaintiff appealed from this order, and the appeal was heard on the 12th and 13th of March, 1885.

Cookson, Q.C., and *Willis Bund*, for the Appellant:—

The onus is on the Defendant to shew why the venue should be changed, and the right of the Plaintiff to fix it will not be readily interfered with: *Philips* v. *Beale* (1). The action is one involving questions which are most properly tried by a jury, and the notice of motion, which only called the Plaintiff's attention to the change of venue, was misleading. The order is premature, having been made before issue has been joined, and it deprives the Plaintiff of his opportunity of applying at the proper time as to the mode of

(1) 26 Ch. D. 621.

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trial, which even in a case assigned to the Chancery Division may be by jury.

Cozens-Hardy, Q.C., *Northmore Lawrence*, and *B. F. Williams*, for *Peacock*:—

Having regard to Order XXVII., rule 13, it is immaterial that issue has not been joined, it being admitted that no amendments are necessary. The Court will not interfere with the discretion of the Judge as to the mode of trial of an action before him: *Ruston* v. *Tobin* (1). [They were then stopped by the Court.]

F. T. Procter, for *Cobb*.

COTTON, L.J.:—

This is an appeal from Mr. Justice *Pearson* in a case which is one of those assigned to the Chancery Division, but where the Plaintiff had selected *Cardigan* as the venue. Mr. Justice *Pearson* is the Judge of the Chancery Division who would in the ordinary course, unless the venue had been fixed by the Plaintiff, have dealt with and disposed of this case, and it must require a very strong case indeed to induce the Court of Appeal to interfere with an order made by the Judge to whose Court a cause is attached, directing how that cause is to be tried. Here Mr. Justice *Pearson* thought that there was sufficient reason for not allowing the place selected by the Plaintiff to be the place where the case should be tried. In my opinion, if we had to decide the case in the first instance, that is a right conclusion, because we know what the geographical position of *Cardigan* is, and that it is most difficult to bring witnesses thither who are not residing in the same neighbourhood. Mr. Justice *Pearson* thought that *Cardigan* was a most inconvenient place for the trial, and I quite agree with him. He thought further that, having regard to all the circumstances that were before him and the nature of the case to be tried, that the action could best be tried in *London*, and he directed that it should be tried by a Judge without a jury. Of course a Chancery action, unless a venue is fixed which prevents it from being tried by a Judge of the Chancery Division, will

(1) 10 Ch. D. 558.

be tried by a Judge of the Chancery Division without a jury, unless the Court thinks fit to direct, for reasons shewn by either party, that it should be tried by a jury. Mr. Justice *Pearson*, on considering this case, thought that the proper mode of trial was that it should be tried by a Judge without a jury. An objection has been taken, that this precludes the Plaintiff from exercising the right given him by Order XXXVI., rule 3, to apply on cause shewn, even in a Chancery action, to have a jury. If the Plaintiff had been put under any disadvantage, I should have been of opinion that he ought to have had an opportunity of fairly bringing before the Judge or before the Court of Appeal those facts which in his opinion would induce the Court to depart from what is the recognised practice in Chancery actions, and to have the case tried with a jury instead of before a Judge without a jury. It was said that the notice of motion was a misleading one, and only called the attention of the Plaintiff to the transfer of the venue from *Cardigan* to *Middlesex*. But in my opinion that is wrong. The notice of motion was that this action be tried before a Judge without a jury in *Middlesex*; or if the Court shall be of opinion that this action ought not to be tried by a Judge without a jury, then that the same may be tried by a Judge with a jury in *Middlesex*. That notice of motion shews that the Defendant was plainly desirous that the case should be tried by a Judge without a jury, and only asked in the alternative that it might be tried by a Judge with a jury in *Middlesex*. In my opinion the Plaintiff had by the notice of motion full opportunity of knowing what was going to be brought forward, and if he wished that the second alternative should be taken against the primary wish of the Defendant, he should have brought forward his grounds, and urged the Judge to take, not the first alternative, but the second. I do not understand that this was done. I cannot see what evidence there could well be to shew whether the case ought to be tried by a Judge with a jury or by a Judge without a jury; but if the Plaintiff considered that he had any such evidence he ought to have brought it forward, and this he has not done.

Then what other objection is there to the order? It is said that the pleadings are not closed, and that the application is therefore premature. If the pleadings had not disclosed the

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issues which would have to be tried, I should have thought the objection a very formidable one, because such an order ought not to be made till the Judge has an opportunity of seeing what the issues are, and judging from their nature whether the case ought to be tried with a jury or without a jury, or where it ought to be tried. But here it is admitted that no amendment is required, and that the Plaintiff does not wish to bring forward any new facts. This being so, the fact that no formal replication has been filed is not one of substance, if it is any objection at all. As I do not see any grounds for interfering with the discretion of Mr. Justice *Pearson*, and as the objection as to the time of this motion being made is not a good one, I think that this appeal should be dismissed.

FRY, L.J.:—

I agree with the judgment of the Lord Justice.

Solicitors for Plaintiff and his Wife and Infant Children: *J. Hughes*, agents for *Hughes & Sons, Aberystwith.*

Solicitors for Defendant *Cobb: Janson, Cobb, Pearson & Co.*

Solicitors for Defendant *Peacock: Lumley & Lumley.*

Solicitors for Defendant *G. Powell: Gush, Phillips & Walters.*

H. C. J.

In re McCLELLAN. McCLELLAN *v.* McCLELLAN.

C. A. 1885 *April* 17.

[1878 M. 17.]

Practice—Appeal for Costs—Administration Action by Residuary Legatee—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 1—*Pending Cause—Rules of Court*, 1875, *Order* LV., *r.* 1.

Order LXV., r. 1, of the Rules of the Supreme Court, 1883, directing that the costs of all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or a Judge, applies, in the case of causes and matters pending on the 24th of October, 1883, when those rules came into operation, only to the costs of proceedings taken on and after that day; and the costs incurred in proceedings taken in such causes and matters before that day, although not adjudicated upon until afterwards, are not within that rule.

In an action for administration by one of several residuary legatees, all the proceedings except those on subsequent further consideration were taken before Order LXV., r. 1, came into operation, though the costs were not adjudicated upon until the order on further consideration which was made afterwards:—

Held, that an appeal would lie as to the costs of such prior, though not as to the costs of such subsequent proceedings.

Farrow v. *Austin* (1) followed.

APPEAL from an order of Mr. Justice *Kay*.

The Plaintiff in this action was, under the will of the testator, entitled to an eighth share in his residuary estate.

On the 17th of January, 1878, after an action for the administration of the testator's estate had been commenced by writ issued on behalf of one of the other residuary legatees against the executors of the will, the Plaintiff, who was the eldest son of the testator, took out an originating summons calling upon the executors to shew cause why an order for the administration of the real and personal estate of the testator should not be granted. Upon this summons an order was made on the 28th of January, 1878, without opposition on the part of the executors, directing an inquiry as to the residuary legatees and the usual administration accounts and inquiries. The proceedings in the action first instituted

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were then stayed, and all subsequent proceedings took place in the Plaintiff's action.

The Chief Clerk's first certificate was filed on the 8th of May, 1880, and on the 13th of May, 1880, an order on further consideration was made at Chambers, directing the sale of certain leaseholds mentioned in the certificate, and the bringing of the proceeds into Court.

The Chief Clerk's further certificate, certifying the result of the sale of the leaseholds, was filed on the 26th of July, 1883, and the action came on for hearing on subsequent further consideration before Mr. Justice *Kay* on the 26th of February, 1884, when his Lordship, allowing the Defendants, the executors and trustees, their costs, charges, and expenses properly incurred out of the estate, refused to give the Plaintiff any costs out of the estate, upon the ground that the proceedings had neither been for, nor had conduced to the benefit of, the estate, within the decision in *Croggan* v. *Allen* (1).

From that order the Plaintiff now appealed.

Fischer, Q.C., and *Begg*, for the Appellant.

Hastings, Q.C., and *B. Eyre*, for the Respondents :—

We take the preliminary objection that this is an appeal for costs only. Under Order LXV., r. 1, of the Rules of the Supreme Court, 1883, subject to a certain saving clause which does not apply to a residuary legatee, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, are in the discretion of the Judge; and under the *Judicature Act*, 1873, s. 49, no order of any Judge as to costs only which by law are left to the discretion of the Court is subject to appeal.

Fischer, Q.C., and *Begg* :—

The Rules of the Supreme Court, 1883, only came into operation on the 24th of October, 1883. They are not retrospective, and according to the preamble of the rules they apply, as regards all causes and matters then pending, only to proceedings taken on

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and after that day. Prior to the *Judicature Act*, a residuary legatee filing a bill for administration was entitled to his costs out of the estate unless special grounds were shewn for depriving him of them, and this right is saved by the Rules of Court, 1875, Order LV., r. 1, which provides that nothing in the rules contained "shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity": *Farrow* v. *Austin* (1). All the costs which are the subject of this appeal except those of the hearing on subsequent further consideration, are costs of proceedings taken in a pending action before the 24th of October, 1883, when the rules of 1883 came into operation. Consequently the rules in force up to that date are applicable to those costs; they are not within the discretion of the Judge, and as to them, at all events, the appeal will lie.

Hastings, in reply:—

Although all the costs except those of the subsequent further consideration were incurred in respect of proceedings taken before the new rules came into operation, they were not adjudicated upon until afterwards, and the Plaintiff could not get them without taking a proceeding for the purpose, as he did on the subsequent further consideration, and this being done after the new rules came into operation, at once brings all the costs within them, and lets in the discretion of the Judge. The Plaintiff in *Farrow* v. *Austin* was not only entitled to a life interest in the entire residue, but was also one of the executors of the will; and one of several residuary legatees cannot be considered as an "other person" entitled as of right to costs out of the estate under the old rules. At all events the new rule applies to the costs of the subsequent further consideration.

Cotton, L.J.:—

This is an appeal by the Plaintiff from a decision of Mr. Justice *Kay* refusing to give costs out of the estate to the Plaintiff, who

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is entitled to a one-eighth share of the residuary estate of the testator. The Defendants have taken a preliminary objection that the appeal is for costs only, and that those costs were in the discretion of the Judge. Now by Order LXV., rule 1, it is provided that "the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division." Looking at that rule, if the costs in this case had been incurred in respect of proceedings which had been taken subsequent to the 24th of October, 1883, when the rules came into operation, they would have been in the discretion of the Judge, and therefore there could be no appeal. Does that rule apply to the present case? In my opinion it does not apply to the costs of the hearing on further consideration, which took place on the 26th of February, 1884. The preamble to the rule defines the proceedings to which they are to apply, namely, to all proceedings taken on or after the 24th of October, 1883, in all causes or matters then pending. But here all the proceedings other than those on subsequent further consideration were taken before that date, although they were not adjudicated upon until afterwards, and in my opinion Order LXV., rule 1, cannot apply to the costs of those prior proceedings. Then looking back at the Rules of Court, 1875, Order LV., rule 1, we find the provision "that nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity." The latter part of that rule does not refer to anything statutory, but to what had been the practice of the Court of Chancery before the *Judicature Act*. I should myself have had some doubt whether a residuary legatee, either absolutely or for life in the whole residue, is in the position of a person who has a right to the costs of an administration action out of the estate unless he has been guilty of some misconduct.

But the decision of the Court of Appeal in *Farrow* v. *Austin* (1) is that a residuary legatee or executor filing a bill for administration has a right to have his costs out of the estate unless that right is displaced by shewing some special grounds for depriving him of them. The preliminary objection, therefore, does not prevail except as to the costs of the hearing on subsequent further consideration, which were clearly within the Judge's discretion.

LINDLEY, L.J. :—

I am of the same opinion. In considering Order LXV., rule 1, and its effect upon proceedings in the Chancery Division, we must look back at the preamble of the Rules of 1883, which may be called the preliminary part of the Order. If we do this we see that the costs of all proceedings pending in the Supreme Court up to the 24th of October, 1883, are to be unaffected by the new rules, and that the costs of all proceedings taken on and after that day in all causes and matters then pending shall be in the discretion of the Court or Judge. We should therefore be giving the new rules too wide an operation if we applied them to the costs of any of the proceedings in this action except those of the subsequent further consideration. Upon the question whether a residuary legatee filing a bill for administration was under the old practice entitled as of right to his costs out of the estate in the absence of special grounds, I should have thought but for the case of *Farrow* v. *Austin* that the costs were in the discretion of the Judge. But we must of course follow that decision.

FRY, L.J. :—

I agree on both points.

The appeal was then heard upon the merits, and in the result was dismissed.

Solicitors for the Appellant: *Jones & Hall.*
Solicitors for the Respondents: *Ashley, Tee, & Son.*

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DANBY *v.* COUTTS & CO.

[1884 D. 635.]

Power of Attorney—Recital—Control of operative Part—Complicity in Fraud—Notice.

The operative part of a power of attorney appointed *X.* and *Y.* to be the attorneys of the Plaintiff without in terms limiting the duration of their powers, but it was preceded by a recital that the Plaintiff was going abroad, and was desirous of appointing attorneys to act for him during his absence:—

Held, that the recital controlled the generality of the operative part of the instrument, and limited the exercise of the powers of the attorneys to the period of the Plaintiff's absence from this country.

During the Plaintiff's absence from *England*, and again after his return, *X.* and *Y.*, without his knowledge and purporting to act under the power, which empowered them to borrow money on mortgage, borrowed moneys from a bank upon the security of charges on the Plaintiff's property, which moneys they afterwards misappropriated. Upon the occasion of the first advance the power was produced to the bankers and registered by their clerk, but it was not examined by them, nor were they aware that the Plaintiff was in *England* when they made the second advance:—

Held, that the charge given during the Plaintiff's absence was valid, and that the charge given after his return was invalid.

The Plaintiff went abroad a second time, and before going gave a fresh power to *X.* and *Y.*, by which, after referring to the former power, and reciting that he had been in *England* for a short time, and was returning abroad, he appointed *X.* and *Y.* his attorneys, giving them power to borrow money for him with or without giving security. During his second absence, and without his knowledge, *X.* and *Y.*, who themselves had an overdrawn account with the bankers, borrowed from them further moneys, alleging that it was to enable them to make payments for the Plaintiff; and under the second power of attorney they charged the Plaintiff's property as a security for the loan, applying the borrowed moneys in reduction of their own debt to the bank. Upon this occasion the second power was produced to the solicitor of the bank, but he was unacquainted with the former transactions, and neither the bankers nor any of their clerks were aware that the Plaintiff had been in *England*:—

Held, that in order to make out that the bank were so put upon inquiry as to invalidate the transaction, the Plaintiff must shew that the recitals in the second power were seen by some agent of theirs who knew of the previous transactions, and would by those recitals have been rendered suspicious of the good faith of *X.* and *Y.*; and consequently that there having been no such notice or knowledge on the part of the bank, wilful blindness could not be imputed to them, and the last-mentioned charge was valid.

IN the month of June, 1879, the Plaintiff, Mr. *George Danby*, a resident in *Australia*, became entitled to a life interest with an

ultimate remainder in fee (subject to certain intervening estates) in a large estate in *Yorkshire* known as the *Swinton Park* estate. In August, 1879, he arrived in *England*, and instructed Messrs. *Frederick Searle Parker* and *William Searle Parker*, of *Bedford Row*, to act as his solicitors.

In October, 1879, the Plaintiff borrowed from the *North British and Mercantile Insurance Company* a considerable sum of money upon the security of his life estate and certain policies of assurance effected with that company. He shortly afterwards returned to *Australia*, but he came back again to *England* in July, 1880, and during this second visit to *England* he borrowed a further sum from the insurance company, and effected an insurance upon his life with them for £65,000. This insurance was not connected with the loan, but was a separate transaction, and the policy was the Plaintiff's own property. Messrs. *Parker* received the moneys raised by the loan and had the custody of the policy.

In August, 1880, the Plaintiff, being about to return again to *Australia*, gave to the Messrs. *Parker* a power of attorney. This instrument (the scope and extent of which was one of the questions in the action) was dated the 16th of August, 1880, and, after reciting that under the wills of *William Danby* and *Anne Vernon Harcourt* the Plaintiff had recently become entitled to the *Swinton Park* estate, continued: "And whereas I am about to return to *South Australia*, and am desirous of appointing an attorney or attorneys to act for me during my absence from *England* in the care and management of the said estate, and dealing therewith either by way of sale, exchange, lease, mortgage, or otherwise, and to do all acts which may be necessary in consequence of my succeeding to the said estates, and in relation thereto, and generally to act for me in the management of, and dealings with, any property belonging to me during my absence from *England*." Then followed the operative part, whereby the Plaintiff appointed *F. S. Parker* and *W. S. Parker* jointly and each of them separately to be his attorneys and attorney, and giving them large powers, in particular, to recover and receive the title deeds and documents relating to the estate, to manage the estate and negotiate and carry out the sale of it, to let it and receive the rents, and also to mortgage all or any "of the same premises." There

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was no mention in the operative part of the instrument of the duration of these powers; and at the close there was a provision that no mortgagee or other person should be bound to inquire into the expediency or propriety of raising the money to be advanced by him, the Plaintiff thereby undertaking to allow, ratify, and confirm everything which his attorneys or their substitute should do or suffer, or purport to do or suffer, by virtue of that power.

The Plaintiff also instructed the Messrs. *Parker* to negotiate for the sale of the fee simple of the *Swinton Park* estate, and to receive the rents during his absence. On the 18th of August, 1880, he went back to *Australia* and he did not return again to *England* until the 18th of June, 1882.

On the 13th of September, 1881, during the Plaintiff's absence from *England*, the Messrs. *Parker*, who had with Messrs. *Coutts*, the bankers, both a drawing account and a borrowing account in their own names (on each of which accounts they were largely indebted) borrowed from Messrs. *Coutts* under the power of attorney the sum of £5000 in the Plaintiff's name and without his knowledge. At the same time they also, without the Plaintiff's knowledge, opened an account in his name with Messrs. *Coutts*, and the £5000 was carried to the credit of that account and drawn out by the Messrs. *Parker* under their power of attorney, and for their own purposes. The power of attorney was produced to the bank by the Messrs. *Parker*, registered by one of the clerks of the bank in a book kept for recording such authorities, and stamped with a mark expressing that it had been so registered.

On that occasion the following document was signed by Mr. *F. S. Parker* as the Plaintiff's attorney.

"13th September, 1881.

"Messrs. *Coutts & Co.*

"Please carry £5000 to my account as an advance on the policy on my life in the *North British Office*, No. 27,784, for £65,000, together with my life interest in the estate of *Swinton Park*, which I hereby charge as security for repayment of the said advance and interest thereon.

"I shall repay this loan on realising the proceeds of the estate.

"(Signed) *Fredk. Searle Parker*,

"Attorney to *George Danby*, Esq."

It appeared from the evidence at the trial of the action that Messrs. *Coutts* had complete confidence in the Messrs. *Parker* and received their statements as to the Plaintiff's property and position without investigation; that they did not require to see any title deed or document with reference thereto; and that the power of attorney was not examined by any of the partners nor submitted to their solicitor; and it appeared also, as his Lordship remarked in reviewing the evidence, that although they understood that the Plaintiff had a life interest in the *Swinton Park* estate, they did not require any explanation of the last clause of this memorandum—that the loan was to be repaid on realising the proceeds of the estate, although any payment out of the capital would be beyond the power of a tenant for life.

In December, 1881, an arrangement was made to purchase for the Plaintiff the remainder in fee of his nephew Sir *Robert Affleck* in the *Swinton Park* estate (which he had acquired by barring an estate tail in remainder) for the sum of £135,500. And in March, 1882, a conditional agreement was entered into for sale of the fee simple for £400,000 to Mr. *Cunliffe Lister*.

On the 18th of June, 1882, the Plaintiff again arrived in *England*, and remained here until the 30th of November following. During this time he was in frequent communication with the Messrs. *Parker*. On the 3rd of August he personally executed a formal contract for sale of the estate to Mr. *Lister*.

On the 4th of August, 1882, the Plaintiff borrowed a further sum of £25,000 from the insurance company on security of his life interest and certain policies of assurance, and on this occasion the policy for £65,000, which had been given up by Messrs. *Coutts* for the purpose, was reduced to £32,500, and the reduced policy, which did not form part of the new security, was returned to the Messrs. *Parker*.

On the 9th of August, 1882, the reduced policy was, without the Plaintiff's knowledge, restored to Messrs. *Coutts*, and the following memorandum was then signed by Mr. *W. S. Parker*:—

"9th August, 1882.

"Messrs. *Coutts & Co.*

"On the 13th of September, 1881, you advanced £5000 to my account, and I now deposit with you Policy No. 27,784 on the

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North British Office for £32,500 on my life, to be held by you as security for the above advance and interest thereon, and I hereby undertake to assign the said policy in any manner you may desire for further and better securing the said advance and interest whenever you call upon me to do so, and at my own expense."

"*George Danby*,
"By *William S. Parker*, his attorney."

On the 29th of September, 1882, the Messrs. *Parker*, purporting still to act under the power of attorney and without the Plaintiff's knowledge, borrowed on his account from Messrs. *Coutts* the sum of £10,000, and upon the occasion of the loan the following memorandum was signed:—

"Messrs. *Coutts & Co.*

"Place to my account with your house the further advance of £10,000 you have agreed to make me. You hold a policy of assurance on my life in the *North British and Mercantile Insurance Company* for £32,500 already in security to you for your former advance to me of £5000 and interest thereon, and you will consider the said policy, together with my life interest in the *Swinton Park* estate as in like manner pledged to you for better securing the above advance of £10,000 as well as your former loan of £5000 and interest thereon respectively. I hereby further engage to execute any more formal security which you may think necessary whenever you call upon me to do so.

"The purchaser of the *Swinton Park* estate is under engagement to make a payment of £50,000 in February next in respect of his purchase, on receipt of which the above loans will be paid."

"*George Danby*,
"By his attorney *William S. Parker*."

This sum of £10,000 was also drawn out by the Messrs. *Parker* and applied by them to their own purposes. None of the foregoing documents were submitted to the solicitors of the bank. At this time the Plaintiff was still in *England*, although Messrs. *Coutts* were unaware of the fact, and upon these transactions arose the first two questions in the case, viz.: (1.) Did the power of attorney so given by the Plaintiff authorize the mortgage of his

policies of assurance; (2.) Did not that power cease to be operative on his return to *England*.

On the 29th of November, 1882, the day before the Plaintiff went back to *Australia* for the third time, he gave a new power of attorney to the Messrs. *Parker*. This instrument (which, as his Lordship said in the course of his judgment, was obviously intended to be the sole authority thenceforward), after reciting (in the terms of the former power) the Plaintiff's title to the *Swinton Park* estate under the before-mentioned wills, and reciting the giving of the former power of attorney in August, 1880, recited as follows: "And whereas I have been residing in *England* for a short time, and being about to return to *Australia*, am desirous of vesting in the said *F. S. Parker* and *W. S. Parker* jointly and severally the powers and authorities herein mentioned." Then followed the operative part, whereby the Plaintiff appointed the Messrs. *Parker*, and each of them, his attorneys in the same manner as before, giving them powers to enforce and carry out the contracts with Mr. *Cunliffe Lister* and Sir *Robert Affleck*, or to make new ones, together with powers similar to those which had been before conferred, as to letting and receiving the rents, and also from time to time to borrow any sum or sums of money for the Plaintiff, and with or without giving security, and in this latter case, to mortgage any part of his estate in such manner as they might think fit, with power to effect any policy on his life, and to mortgage the same.

The Plaintiff went back again to *Australia* for the third time on the 30th of November, 1882, and did not return till the 14th of January, 1884.

In the meantime a question arose as to the Plaintiff's title to the estate, which was settled by agreement with the remainderman—Sir *R. Affleck*—to whom the Plaintiff agreed to pay an additional sum of £5000 in order to get rid of his opposition to the sale of the estate. In June, 1883, further transactions took place, upon which a suggestion of complicity between Messrs. *Coutts* and the Messrs. *Parker* as against the Plaintiff, was founded; and the following was the effect of the evidence relating thereto.

In June, 1883, when the Plaintiff was in *Australia* again, the Messrs. *Parker* had overdrawn their own account with Messrs.

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Coutts more than £14,000 for which Messrs. *Coutts* had not any specific security. They expostulated. The Messrs. *Parker* wanted another £6000, and represented that £3000, part of their existing overdraft, was money which they had paid on behalf of the Plaintiff, and that the additional £6000 which they required was also to make a payment on his account, both payments being to Sir *R. Affleck*, from whom the Plaintiff was purchasing his reversion in the estate. The Messrs. *Parker* did not then, according to the evidence of Mr. *Malcolm*, a partner in the bank, propose to raise money under the power of attorney, but to give a charge on the money they had paid for the Plaintiff. Mr. *Logan*, one of the principal clerks in the loan department of the bank, accordingly drew a slip, but Mr. *Malcolm* not being satisfied with the form of it, referred the matter to the solicitor of the bank, who then drafted the following document, which was signed by Mr. *F. S. Parker* on behalf of himself and Mr. *W. S. Parker*, and not as the attorney of the Plaintiff:—

"*London*, 11th June, 1883.

"Messrs. *Coutts & Co.*,—We, being indebted to you in a considerable sum for advances made to us, and you having agreed to honour our draft for the further sum of £6000, being part of a sum of £9000 paid by us to Sir *Robert Affleck*, Bart., on account of *George Danby*, Esq., we hereby, under the power of attorney which we hold from the said *George Danby*, to act generally in his affairs, charge and make liable the policy of assurance on his life now in security to you, with the payment to you of the sum of £9000 (so paid by us on his account as aforesaid) and with interest thereon. And for further and better securing to you the said sum of £9000 and interest, we hereby charge and make liable with the payment thereof so much of the purchase-money for the *Swinton Park* estate contracted to be sold to *Samuel Cunliffe Lister*, Esq., as will be payable to us or the said *George Danby* under the said power of attorney, on the completion of the said sale.

"For self and *Wm. S. Parker*,
(Signed) *Fred. Searle Parker*."

Upon this occasion, the above-mentioned agreement with Sir *R. Affleck*, the remainderman, and the second power of attorney,

were produced to the solicitor, and the agreement and a copy of the power were deposited with the bank, and in the solicitor's bill of costs against Messrs. *Coutts* there were entries under date the 12th of June for perusing and making copy of this power of attorney, and on the 13th for "attending Messrs. *Coutts & Co.* with and upon copy power." Mr. *Malcolm*, however, said in his evidence that this power was never shewn to the other partners, nor brought to their attention in any way, that it was put in a bundle with Sir *R. Affleck's* agreement, and placed among Messrs. *Parker's* securities, and not the Plaintiff's, and it did not appear that the attention of anyone except the solicitor was drawn to the terms of it. It was not registered or stamped as the first power had been.

It appeared from the evidence of Mr. *Malcolm* and Mr. *Logan*, that throughout these transactions Messrs. *Coutts & Co.* frequently made inquiries of the Messrs. *Parker* where the Plaintiff was, and when he was likely to be in *England*, as they were desirous of seeing and knowing a gentleman for whom they had opened an account, and who might be expected to be a good customer of the bank; but though they often received an answer that he was expected to return, in the result they were always told that he had not in fact come back to this country.

On the 21st of June, 1883, one of the Messrs. *Parker* called at the bank and said that the moneys which they had expected had not come from the Plaintiff, and thereupon a new memorandum was signed as follows:—

"21st June, 1883.

"Messrs. *Coutts & Co.*

"Be pleased to carry £9000 to the account of *George Danby*, Esq., on the security of the charge on his interest in the *Swinton* estate.

"This loan will be repaid in the course of one month.

"*Frederick Searle Parker*,

"Attorney to *George Danby*."

The £9000 was then credited to the account of the Plaintiff with Messrs. *Coutts*, and drawn out by the *Parkers* in reduction of their own debt to the bank.

The third question in the action was whether from this trans-

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action the Court should infer that Messrs. *Coutts* were implicated in the fraud of the *Parkers*, and were employing these moneys of the Plaintiff to liquidate their indebtedness to the bank.

Or fourthly, whether they were not, at any rate, so far put upon inquiry that any ordinary man of business would have made an investigation which would have revealed the *Parkers*' fraud, and prevented any further dealings.

After this, on the 17th of October, 1883, a further advance of £6000 was obtained from Messrs. *Coutts* by the *Parkers*, ostensibly for the Plaintiff, and without his knowledge, and the following memorandum was given:—

"17th October, 1883.

"Messrs. *Coutts & Co.*,

"Be pleased to carry to the account of *George Danby*, Esq., £6000 as a further advance on the policy of assurance for £32,500 and life interest in the *Swinton Park* estate already in security to you.

"This loan will be repaid in the course of a month from this time.

"*George Danby*,
"Per *Fred. Searle Parker*."

This money was also misappropriated.

The fifth and last question in the action was whether the second power of attorney authorized a mortgage of the policy for £32,500, but this question turned entirely upon the language of that power.

The Plaintiff returned to *England* on the 14th of January, 1884. During the year 1883 he had been pressing the Messrs. *Parker* for remittances, but got no answer, and had become suspicious; and on his return he asked them for an account of their dealings. They furnished him with one which was not satisfactory. The Plaintiff tried in vain to see them, and in February, 1884, they absconded. In March the Plaintiff instructed his present solicitors, and with their assistance he discovered the foregoing transactions by which the Messrs. *Parkers* had purported to effect charges amounting together to £30,000 upon his property. This led to the institution against Messrs. *Coutts & Co.*, on the 28th of March, 1884, of the present action, by which the

Plaintiff claimed a declaration that the documents or alleged charges of the 13th of September, 1881, the 9th of August, and the 29th of September, 1882, and the 11th and 21st of June, and the 17th of October, 1883, were not binding upon him, to have such documents delivered up to be cancelled, and to have the policy for £32,500 delivered up or re-assigned to him.

The Solicitor-General (Sir *F. Herschell*, Q.C.), *Hastings*, Q.C., and *Renshaw*, for the Plaintiff:—

First, the power of attorney of August, 1880, must be construed with reference to its main purpose, viz., the dealing with and management of the *Swinton Park* estate, and, however, wide its general words may be, their operation will be limited to the real purpose and object of the power: *Esdaile* v. *La Nauze* (1). Accordingly the power did not warrant the charge upon the Plaintiff's policies of assurance. Secondly, the authority to act for the Plaintiff conferred by the power was restricted to the period of his absence from *England*, and ceased to be operative the moment he returned. The power bore upon its face notice of that limitation of authority, *i.e.*, the recitals which precede the operative part, and took the case out of the principle that a general authority may be held to continue until notice has been given of its determination. That the parties acted on this view is shewn by the giving of a new power before he returned again to *Australia* in November, 1882. Accordingly as Messrs. *Coutts* had notice that they were dealing with persons having a limited authority, they must shew that the transaction is within such authority.

[KAY, J.:—If the power of attorney *ex facie* had come to an end, it would be as though there was none, and it would not matter whether they had notice of the Plaintiff's return or not.]

Being a limited power, they should have satisfied themselves that the transaction was within the limit, and not having done so, the charge of the £10,000 is clearly invalid.

Then with reference to the charge of £9000 under the second power effected by the document of the 11th of June, 1883, that document shewed on the face of it that under a power to borrow

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for the Plaintiff's purposes, the *Parkers* were charging his property in respect of their own debt to the bank. The second power contained a recital that the Plaintiff had been residing in *England* for a short time, and was about to return to *Australia*, and at the time of the charges of £9000 in June, 1883, and £6000 in October, 1883, there were facts within the knowledge of Messrs. *Coutts*, which ought to have put them as ordinary men of business on inquiries, and those inquiries would have exposed the falsehood of the *Parkers'* statement that the Plaintiff had never been in *England*, and have led to the disclosure of their frauds; and upon that ground also these charges, even if within the terms of the second power, cannot stand.

Robinson, Q.C., *Davey*, Q.C., and *Vaughan Hawkins*, for the Defendants:—

This is a contest between innocent parties: First, the words of the first power of attorney are wide enough to admit of a pledge by the attorneys of the Plaintiff's policies. A mortgage of a life estate is invariably accompanied by a policy, and if a new policy could have been effected for the purpose, an existing policy originally effected for a similar purpose could be taken advantage of. Secondly, the power was not revoked by the return of the grantor. By the operative part the attorneys were appointed in general terms, and no limit was put to the duration of their powers. A recital does not control the operative part of a deed where such operative part is clear: *Dawes* v. *Tredwell* (1). Here the grantor having given wide general powers, agrees to ratify everything which his attorney has purported to do under the power: *Perry* v. *Holl* (2). The expression "I am desirous" only shews motive and not intention: *Moore* v. *Magrath* (3).

[KAY, J., referred to *Lord Arlington* v. *Merricke* (4) and *Liverpool Waterworks Company* v. *Atkinson* (5).]

The rule is that if the operative part of a deed is ambiguous, the recitals may be referred to for the purpose of construction, but if there is no ambiguity in the operative part, effect must be given to it notwithstanding the recitals: *Young* v. *Smith* (6).

(1) 18 Ch. D. 354.
(2) 2 D. F. & J. 38.
(3) 1 Cowp. 9.
(4) 2 Wms. Saund. 813.
(5) 6 East, 507.
(6) Law Rep. 1 Eq. 180.

If there is a variance between them, the recital, which is treated merely as an expression of motive, is not to control the operative part of the deed. The only exceptions to the canon, that "you cannot control clear words of conveyance by words of recital," are in the cases of general words in a conveyance, and general words in a release: *Rooke* v. *Lord Kensington* (1); and in the case of recitals in the conditions of bonds, of which *Lord Arlington* v. *Merricke* (2) and *Liverpool Waterworks Company* v. *Atkinson* (3) are examples. And these exceptions are founded on the practice of conveyancers.

Thirdly, neither of the powers on the face of them conveyed notice of any fraud. If Messrs. *Coutts & Co.* had themselves read the second power, it would not have given them notice or even have aroused their suspicions; but in fact they did not know of its existence, and though their solicitor did, he was not aware of the former transactions, and only regarded the second power as one of the title deeds of the *Swinton Park* estate. No sufficient notice of the whereabouts of the Plaintiff to negative his authority can be imputed to the Defendants, and the doctrine of constructive notice should not be extended in favour of a person who, after reposing an over confidence in his attorney, seeks to throw upon those who dealt with that attorney, in carrying out the purposes of the power, the consequence which would result from fixing them with knowledge of what he did not think it worth while to tell them in the operative part of his deed.

The Solicitor-General, in reply:—

Where the operative part of an instrument is specific, you cannot look at a recital for the purpose of cutting it down; but where the operative part is in general terms any recital may be looked at for the purpose of restricting such generality, and this rule applies even when the operative part is in a conveyance: *Jenner* v. *Jenner* (4).

The rule, however, is not hard and fast, you must look at "the general object and intention of the parties": *Jenner* v. *Jenner*. Here the only operative part simply creates the *Parkers* attorneys

(1) 2 K. & J. 753, 769.
(2) 2 Wms. Saund. 813.
(3) 6 East, 507.
(4) Law Rep. 1 Eq. 361.

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of the Plaintiff, while the recitals render it, not a general appointment but one during the absence of the Plaintiff; and "the object and intention" was that they should only so act, and this was the reason for and purpose of the power. *Childers* v. *Eardley* (1) is to the same effect.

As to notice, the Defendants cannot split themselves up. Notice to one is notice to the other. It is clear that the second power was handed to *Logan* as a separate transaction, and if read it would have shewn that the Plaintiff had been in *England*, and would have led to inquiry.

KAY, J.:—I will consider this case.

Feb. 27. KAY, J.:—

This action is occasioned by the fraud of the notorious *Parkers*, the solicitors who recently absconded having extensively defrauded those who trusted them.

[His Lordship then stated the facts of the case, and the various questions arising thereon, and continued:—]

Dealing first of all with the third of the various questions which I have indicated, viz., whether from the transactions attending the loans of £9000 in June, 1883, and £6000 in October, 1883, the Court should infer that the Messrs. *Coutts* were implicated in the fraud of the *Parkers*, and were employing moneys of the Plaintiff to liquidate their indebtedness to the bank; it is perhaps not surprising that the Plaintiff, having been grossly defrauded by the *Parkers*, in whom he had such entire confidence, should suspect other persons dealing with them of having assisted to defraud him. But after a most careful consideration of the evidence, I am of opinion not only that he has failed to make out any complicity on the part of Messrs. *Coutts*, but also that Mr. *Ryder's* and Mr. *Malcolm's* statements that the bank had not the slightest suspicion that the *Parkers* were acting improperly, but considered the transactions to be perfectly *bonâ fide* for the benefit of the Plaintiff, is the real truth of the case. I believe that in June, 1883, the bank had as much confidence in these men as the Plaintiff himself had, and nothing can shew more

(1) 28 Beav. 648.

strongly the position which they held in the estimation of both than the very large powers which the Plaintiff gave to them to deal with his property in his absence without any sort of control, and the accommodation which the bankers were willing to allow them, and the absolute reliance they placed upon their representations.

The fourth question seemed at first sight to raise a more plausible ground of complaint against the bank, but on this point also the Plaintiff's evidence seems to me to break down.

He has not shewn, and I do not believe it to be the fact, that the second power of attorney, or any copy of it, was read by the partners or by Mr. *Logan*, or by anyone on behalf of the bank, except their solicitor.

The solicitor seems to have been ignorant of the previous loans by the bank, and therefore the recital that the Plaintiff had a short time before the date of the second power been residing in *England* would appear to him quite immaterial. It is not a question of constructive notice of the second power, which the bank certainly had; but in order to make out that the bank were put upon such inquiry as would invalidate the subsequent transaction, it is incumbent on the Plaintiff to prove that the recital he relies on was seen and read by some of their agents who knew of the previous transactions, and would by that recital have been rendered suspicious of the *Parkers'* good faith.

This he has failed to do, and my belief is, as I have said, that it was not in fact read by any person connected with the bank except the solicitor.

Whether the proceedings in this respect and otherwise connected with the transaction of June, 1883, were conducted with due care in a business-like manner, or were unbusiness-like and negligent, it is not necessary more particularly to inquire. Even if there were a great amount of negligence, which I do not mean to impute, it would not serve the Plaintiff's case, which is that there was such notice or knowledge as should have put the bank upon inquiry, and that there was something like wilful blindness on their part, and this, in my opinion, was not the case.

As I intimated during the argument I think that the Plaintiff and Defendants must be treated as perfectly innocent persons who

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have been injured by the fraud of third persons, and this obliges the Court to examine very critically the remaining questions in order to determine to what extent each must suffer by such fraud.

I take next in order the second question, whether or not the power of attorney of the 16th of August, 1880, ceased to be operative during the Plaintiff's residence in *England* from the 18th of June, 1882, till the 30th of November in the same year. [His Lordship then stated the terms of the power to the effect above set forth, and continued :—]

The argument on the part of the Defendants, while admitting that any one dealing with an attorney under such a power as that of the 16th of August, 1880, is bound to be cautious and to take care that the limits of the power are not exceeded, as was laid down in *Attwood* v. *Munnings* (1), urged that this case comes within a supposed general rule that the operative part of an instrument cannot be controlled by a recital.

But I am of opinion that the rule was stated in that argument far too widely. The true rule is given in the language of Lord *Hatherley* in *Rooke* v. *Lord Kensington* (2), "that you cannot control clear words of conveyance by words of recital," but he goes on to point out that, "the exception will be found to be always, that general words are not within that description of clear words of conveyance which cannot be controlled by the recital."

And in *Jenner* v. *Jenner* (3), where the authorities are collected and examined, the same learned Judge acted upon that principle, relying upon Lord *Ellenborough's* words in *Payler* v. *Homersham* (4), "the general words of a release may be restrained by the particular recital. Common sense requires that it should be so, and in order to construe any instrument truly you must have regard to all its parts, and most especially to the particular words of it."

That is a canon of construction more satisfactory and of larger application than the other, and it applies to the case before me.

The operative part of this instrument does not refer in any way to the duration of the power, therefore a statement in the recital or in any other part of it that it was only intended to have effect

(1) 7 B. & C. 278.
(2) 2 K. & J. 769.
(3) Law Rep. 1 Eq. 361.
(4) 4 M. & S. 423.

during the donor's absence from *England*, would not be repugnant to anything in the operative part. It is only a conclusion of law, that if such a power is silent as to its duration it must last during the donor's life, or until he revokes it.

I asked during the argument if the recital had contained a stipulation in the most express words that could be employed that the power should only be used during the donor's absence or other limited time, whether that could be disregarded, and the answer was that it could.

With that I am unable to agree. A power of attorney, like a release or a bond as in the case of *Lord Arlington* v. *Merricke* (1), seems to me precisely the kind of instrument which may be limited by a recital. And the only question upon which it appears to me there can be any reasonable doubt is whether that is the true effect of the recital in this power.

It is said that it was only inserted for the purpose of shewing the motive for giving the power of attorney, but I can see no object in introducing the recital for that purpose. And after the best consideration I can give to the matter I come to the conclusion that the words "during my absence from *England*," which occur twice in this recital, are there used for expressing the limit of time during which the power was to be exercised.

This is evidently the view taken by the parties themselves, for during the stay of the Plaintiff in this country in 1882, a new power was executed.

It was admitted of course that the fact that Messrs. *Coutts & Co.* had no notice of the Plaintiff's return was immaterial.

This conclusion renders it unnecessary to express an opinion on the first question, whether the power authorized a mortgage by the attorneys of the policy for £32,500, which is a point of some difficulty.

The result so far is, that the equitable mortgage of the 13th of September, 1881, of the Plaintiff's interest in the *Swinton Park* estate for £5000 is valid, but that the mortgages of the 9th of August, 1882, and the 29th of September, 1882, made while the Plaintiff was in *England*, are invalid.

There remains the fifth question, whether the second power of

(1) 2 Wms. Saund. 813.

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the 29th of November, 1882, authorized the attorneys to effect a mortgage of the policy for £32,500.

This power is in somewhat different terms from the former one. There is no recital as to its duration or purpose. It contains an express authority to effect new policies upon the life of the Plaintiff, and to mortgage such policies when effected, which the first power did not.

If it confers authority to mortgage existing policies, this must be given by the particular words relating to mortgages, or by the general words. [His Lordship then referred in detail to the words of the second power, and continued:—]

The power might have been more explicit, but in a question between the donor and persons who have taken a security on this policy of £32,500, I think I must hold that if there be any doubt a construction which is against the donor must prevail.

The result is that the £9000 secured by the document of the 21st of June, 1883, is a charge only on the Plaintiff's interest in the *Swinton Park* estate, and that the £6000 secured by the document of the 17th of October, 1883, is a charge both upon his life interest in that estate and on the policy for £32,500. The costs of the action, so far as it seeks to invalidate the securities which I have held to be good, and so far as relates to the attempt to charge Messrs. *Coutts* with any complicity in the fraud of the *Parkers*, or with liability by reason of not having made proper inquiries, must be borne by the Plaintiff, the action in these respects being dismissed with costs. The costs of the action, so far as it relates to the alleged securities of the 9th of August, 1882, for £5000, and the 29th of September, 1882, for £10,000, which I declare to be invalid, must be paid by the Defendants.

There must be the usual set-off of costs.

Solicitors: *Waterhouse, Winterbotham & Harrison; Farrer & Co.*

W. W. K.

In re WADSWORTH.
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[1882 W. 954.]

*Solicitor's Lien—Property "recovered or preserved" in Action—Solicitor discharged before Trial—*23 *&* 24 *Vict. c.* 127, *s.* 28 [*Revised Ed. Statutes, vol. xiii., p.* 881].

A solicitor, through whose instrumentality property has been recovered or preserved in an action, is entitled under the 28th section of the *Attorneys and Solicitors Act*, 1860, to a declaration of charge upon such property, although his client may have discharged him before the trial of the action.

In such a case his charge will be subject to the lien for costs of the client's solicitor for the time being.

Money paid into Court as a security for the costs of a party to an action is not in case by the success of the party it becomes repayable to him, property "preserved" in the action within the meaning of the Act.

ADJOURNED SUMMONS.

The Plaintiff brought this action, *inter alia*, to establish his right to have a sum of £278 paid to him out of trust funds in the hands of the Defendant. The Defendant did not admit in his statement of defence that the Plaintiff was entitled to the sum he claimed, and the Plaintiff went into evidence to prove it. The Plaintiff being out of the jurisdiction, the Defendant made an application in the action that the Plaintiff might give security for costs, and under an order made thereon the Plaintiff paid into Court the sum of £100 as a security for the Defendant's costs and to abide the result of the action.

The action came on for trial on the 23rd of February, 1885, and judgment was given ordering the Defendant to pay the Plaintiff the £278 and the costs of so much of the action as related thereto, directing an inquiry at the risk of the Plaintiff as to certain other costs, and providing for the remainder of the costs of this action.

The present applicant was a solicitor who had acted as the solicitor of the Plaintiff in the institution and conduct of the action (including the preparation of his evidence) down to the 22nd of December, 1884, when the Plaintiff discharged him and instructed another solicitor.

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The applicant by his summons sought a declaration that, under the *Attorneys and Solicitors Act*, 1860 (23 & 24 Vict. c. 127), s. 28, he was entitled to a lien for his costs upon the above-mentioned sums of £278 and £100 as "property recovered or preserved" through his "instrumentality."

Pyke, in support of the summons :—

The 28th section of the *Attorneys and Solicitors Act*, 1860, empowers the Court in every case in which a solicitor shall be employed to prosecute or defend any proceedings to declare him entitled upon a charge upon any property recovered or preserved through his instrumentality. Under this section "what is recovered by the action of the solicitor is to be treated as if he had earned salvage," and "he is to be paid for his services on the theory that salvage services have been rendered": *Greer* v. *Young* (1); *The Atlas* (2). If he has rendered such services and property has been recovered or preserved through his instrumentality, it is immaterial that he ceased to be the solicitor before the day on which the action is tried, otherwise a solicitor's title to the charge under the Act could always be ousted by discharging him the day before the trial.

The £278 was clearly "recovered" and the £100 was "preserved" to the Plaintiff, who gets it back again: *Hunt* v. *Austin* (3); *Scholefield* v. *Lockwood* (4); *The Heinrich* (5); *Pierson* v. *Knutsford Estates Co.* (6).

Renshaw, for the Plaintiff in the action :—

In order to entitle a solicitor to a declaration of charge under the 28th section of the Act, although he need not be the solicitor of the party at the time of the application for the charge, he must have been his solicitor at the time when the judgment was delivered whereby the property was recovered or preserved; and there is no case in which a declaration of charge has ever been made in favour of a solicitor who ceased to be the solicitor of the party before trial. The observations of Mr. Justice *Grove*, in

(1) 24 Ch. D. 545, 552.
(2) Lush. Adm. Rep. 518.
(3) 9 Q. B. D. 598.
(4) Law Rep. 7 Eq. 83, 87.
(5) Ibid. 3 A. & E. 505.
(6) 13 Q. B. D. 666.

Clover v. *Adams* (1) are in point: "If indeed at the time the money was paid into Court he was not the solicitor, there might be a strong and perhaps a conclusive argument against him, but here the applicant was the solicitor at the time the money was paid into Court."

[KAY, J.:—There the solicitor had discharged himself.]

At all events the lien of the existing solicitor has the priority: *Cormack* v. *Beisley* (2); *Morgan* and *Wurtzburg* on Costs (3). Moreover the £278 was not "recovered," nor was the £100 "preserved." The £100 was rather "imperilled" than "preserved."

Pyke, in reply.

KAY, J. (after stating the facts of the case):—

It is said that the £278 was not money "recovered or preserved" in the action, but I have no idea what is the meaning of the word "recovered" if this money was not recovered. *A.* brings an action against *B.* for the sum of £278. *B.* says, "I put you to prove your claim: I do not admit that you are entitled." *A.* goes into evidence and brings the action on for trial, and at the hearing judgment is given that *B.* do pay to *A.* £278. I think it quite plain that sum was in such case recovered in the action. Then it is said that the applicant is not entitled to a charging order, because he ceased to be the solicitor before the action came on for trial. But the language of the Act of Parliament is this: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any . . . proceeding in any Court of Justice, it shall be lawful for the Court or Judge before whom such . . . proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property . . . which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such proceeding."

(1) 6 Q. B. D. 622, 624. (2) 3 De G. & J. 157.
(3) 2nd Ed. p. 561.

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The words are "through the instrumentality" of such solicitor: suppose that a solicitor is employed in a hotly contested action, and prepares the whole of the case of the plaintiff down to the moment of trial, and that just before the trial the plaintiff changes his solicitor, and then, owing to the exertions of the solicitor formerly employed, succeeds in the action. Can it possibly be said that success is not owing to the instrumentality of the discharged solicitor? I cannot conceive that it could fairly be held that such a case as that is not within the statute. I have heard no reason whatever for doubting that the exertions of the applicant were instrumental in procuring the result which was arrived at. Therefore it seems to me that the fact that he had ceased to be solicitor before the judgment was delivered, is not a good reason why a charging order should not be made in his favour. No doubt the solicitors who were acting for the Plaintiff at the time when this property was recovered, and the order made for payment, would have, quite independently of the Act, a lien on this sum of money. That was the law long before this statute. I cannot make any charging order which would interfere with that lien, but I think it right to make a charging order for the costs due to the present applicant on the £278, subject always to the lien which the Plaintiff's present solicitors may have upon it. Then there remains the question as to the £100, which is a very curious one. The argument is that though this money has not been "recovered," it has been "preserved" in the action, because, it being paid into Court to answer the costs of the Defendant, the result of the action is that it will not be wanted for that purpose. I cannot accede to that. It seems to me that "recovered" and "preserved" must refer to that which is the subject-matter of the action. I think, as was suggested by Mr. *Renshaw*, the truth is that the effect of the action as to this sum was that it was imperilled but not "preserved." Therefore, I cannot make any charging order in respect to the £100. There will be a declaration that the applicant is entitled to a charge on the £278 for his costs properly incurred, to be taxed, subject to the lien of the present solicitors.

Solicitors: *W. Easton; Jaques, Layton, & Jaques.*

W. W. K.

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CHITTY, J.

1885

April 18, 20.

[1884 R. 1369.]

Will—Power—Married Woman—General Testamentary Power—Execution of Power—Ownership—Remoteness.

A married woman exercised a general testamentary power :—

Held, that time under the rule against perpetuities ran from her death, and not from the date of the instrument creating the power.

In re Powell's Trusts (1) discussed and not followed.

By a settlement dated the 12th of July, 1800, made on the marriage of *John Abdy* and *Caroline Hatch*, certain sums of Bank stock and Bank annuities were assigned to trustees upon trust to pay the income to *John Abdy* during the joint lives of *John Abdy* and *Caroline Hatch*, and after his decease to pay the income to *Caroline Hatch*, and after her decease upon trusts in favour of the children of the marriage as therein mentioned, with a proviso that if there should not be any child or children of the marriage (which event happened), then the trustees should stand possessed of the Bank stock and Bank annuities upon trust, if *Caroline Hatch* survived *John Abdy*, to transfer the same to her executors, administrators or assigns, but that if she should die in his lifetime (which event happened), then upon trust to transfer the same to such person or persons, upon such trusts, and for such intents and purposes, and subject to such provisoes and declarations as she should by her will, notwithstanding her intended coverture, direct or appoint, and in default thereof, or in case any such direction or appointment should be made which should not be a complete and entire disposition of the whole of the Bank stock and Bank annuities, then upon trust that the trustees should stand possessed of the same, or so much thereof as should remain unappointed or undisposed of, in trust for *John Abdy*, his executors, administrators or assigns, and should transfer the same to him or them accordingly.

By her last will, dated the 7th of April, 1838, *Caroline Hatch* then *Caroline Abdy*, in pursuance and by virtue of the power and

(1) 39 L. J. (Ch.) 188.

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authority given and reserved to her in and by the above indenture of settlement, and of all other powers and authorities in her vested, or her thereto enabling, and in exercise and execution thereof, directed and appointed that the trustees of the settlement should as soon as might be after her decease transfer the funds then subject to the trusts of the settlement into the names of *Thomas Mills* and *Charles Druce*, to whom the testatrix also appointed and gave all the moneys, stocks and funds which she had power to dispose of by virtue of the settlement, upon trust to lay out and invest the same in the purchase of land to be conveyed to the use of *John Abdy* for life, and after his decease to, for, and upon the uses, trusts, intents and purposes, and with, under, and subject to the powers, provisoes, declarations and agreements limited, expressed, declared and contained in and by an indenture of settlement bearing even date with, but executed before, the execution of that her will (of which settlement the said *Thomas Mills* and *Charles Druce* were also trustees), and the testatrix appointed the said *Thomas Mills*, *Charles Druce*, and her husband, trustees and executors of her will.

By the indenture so referred to in the will of *Caroline Abdy*, and dated the 7th of April, 1838, it was agreed and declared that the hereditaments and premises thereby appointed should from and after the decease and failure of issue of *Caroline Abdy* (but subject to the prior uses and estates therein mentioned), go, remain and be to the use of *James Mills* and his assigns during his life, and after his decease to the use of his issue in tail as therein mentioned, and in default of such issue to the use of *Christopher John Mills* for his life, and after his decease to the use of the Plaintiff *William John Rous* for life, and after his decease to the use of his first and other sons in tail male, with divers remainders over.

Caroline Abdy died on the 4th of May, 1838, without ever having had any issue, and her will was proved by her husband and the other two executors, and the funds then subject to the trusts of the indenture of the 12th of July, 1800, were transferred into the names of the said *Thomas Mills* and *Charles Druce*.

John Abdy died on the 1st of April, 1840, having by his will given all the residue of his personal estate and effects to *Thomas*

Abdy for his own use and benefit, who died on the 20th of July, 1877, having by his will appointed the Defendants *Cartmell Harrison* and *James Crofts Ingram* executors thereof.

Christopher John Mills died on the 4th of October, 1855.

James Mills died on the 18th of December, 1883, without ever having had any issue. *James Mills* and the Plaintiff were both born subsequently to the execution of the indenture of the 12th of July, 1800.

The trust funds appointed by the will of *Caroline Abdy* were never invested in the purchase of land pursuant to the direction in that behalf in her will, and were when this action was commenced standing in the name of the trustees of her will.

The Plaintiff claimed a declaration that the will of *Caroline E. H. Abdy* operated as a valid execution of the power of appointment reserved to her by the indenture of the 12th of July, 1880, and that the trust funds subject to the indenture of settlement were validly appointed, and that the Plaintiff was entitled to the income thereof.

Rigby, Q.C., and *Stirling*, for the Plaintiff:—

Mrs. *Abdy* having executed the power of appointment over the funds given to her by the indenture of the 12th of July, 1800, has made the funds her own and part of her own estate: *Brickenden* v. *Williams* (1); *Wilkinson* v. *Schneider* (2).

It will be contended by the other side that the appointment under the will must be read as part of the settlement of 1800, and therefore that, according to the decision in *In re Powell's Trusts* (3), it is invalid as limiting life estates to person unborn at the date of the settlement, and so contravening the law against perpetuities. No doubt that decision is against our contention, but we say that case is contrary to all the authorities and to the opinion of all the text-writers, and ought not to be followed and is not binding on a Court of first instance.

Mrs. *Abdy* had power to deal with this fund as if it had been property simply settled to her separate use: *In re Pinède's Settlement* (4).

(1) Law Rep. 7 Eq. 310.
(2) Ibid. 9 Eq. 423.
(3) 39 L. J. (Ch.) 188.
(4) 12 Ch. D. 667.

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They also referred to *Stackpoole* v. *Stackpoole* (1); *Sugden* on Powers (2); *Lewis* on Perpetuities (3); *Williams* on Personal Property (4); *In re Van Hagan* (5).

Macnaghten, Q.C., and *Whately*, for Messrs. *Harrison* and *Ingram*, the executors of *Thomas Abdy*:—

This is the case of an appointment by will made by a married woman during coverture, and all the cases relied on by the other side have reference to the exercise of a general power of appointment by a man, and the remarks of the text-writers only refer to the case of the exercise of the power by a man. The execution of the power by Mrs. *Abdy* did not make the fund part of her separate estate: *Pike* v. *Fitzgibbon* (6); *London Chartered Bank of Australia* v. *Lemprière* (7). Therefore she could only dispose of it by virtue of her will being read into the settlement of 1800, and then, according to *In re Powell's Trusts* (8), which is a case on all fours with the present, the limitations under the appointment are void as contravening the law against perpetuities, and we are entitled to the fund as the representatives of the husband, who take in default of appointment.

They also referred to *In re Pinède's Settlement* (9); *Re Philbrick's Settlement* (10); *In re Hoskin's Trusts* (11).

Rigby, in reply, referred to *Butler's* note to *Coke* upon *Littleton* (12).

Ince, Q.C., and *W. Druce*, for the trustees of Mrs. *Abdy's* will.

CHITTY, J. (after stating the facts of the case proceeded as follows):—

Mrs. *Abdy* by her will expressly exercised the power of appointment given her by the settlement, directing the trustees of that settlement to transfer the funds comprised in the power to two

(1) 4 D. & War. 320.
(2) 8th Ed. pp. 394–396.
(3) Page 487.
(4) Ed. 1870, p. 308.
(5) 16 Ch. D. 18.
(6) 17 Ch. D. 454.
(7) Law Rep. 4 P. C. 572.
(8) 39 L. J. (Ch.) 188.
(9) 12 Ch. D. 667.
(10) 34 L. J. (Ch.) 368.
(11) 6 Ch. D. 281.
(12) 272 a.

trustees named by her, to whom she also appointed and gave "all other moneys, stocks, and funds of which she had power to dispose by virtue of the said indenture of settlement or otherwise howsoever" upon the trusts and to and for the intents and purposes therein mentioned.

The principle laid down by *Wilkinson* v. *Schneider* (1) is firmly established, that under a general testamentary power of appointment such as this the trustees of the settlement creating the power are bound to hand over the trust funds in their hands to the persons named by the donee of the power, and therefore the trusts in default of appointment cannot arise.

In the case of the exercise of such a power by a man the rule is clear. In the case of a married woman, which is the case before me, the late Master of the Rolls has decided in the case of *In re Pinède's Settlement* (2) that the married woman can make the fund her own by exercising the power, and in this case if all the trusts limited by Mrs. *Abdy* had failed, I have no doubt that her husband would be entitled to take the property by virtue of his marital right.

On the part of the representatives of the husband it is argued that the trusts of the will and settlement of even date are to be incorporated with and read as part of the settlement of 1800, and that then, according to the decision of *James*, V.-C., in *In re Powell's Trusts* (3), they are invalid as contravening the rule against perpetuities: that is so, and the question therefore arises whether the decision in *In re Powell's Trusts* is consistent with the course of authorities. *James*, V.-C., in that case decided that such a general testamentary power of appointment given to a married woman is not equivalent to ownership, so that as regards the rule against perpetuities the interest arising under the execution of the power by her will must be considered as created under the deed or will conferring the power.

This decision is reported in the *Law Journal* reports, and also in the *Weekly Reporter*, but it is not reported in the *Law Reports*, but I am not entitled to say on that account that it is not properly reported, or an authority to which I need pay no attention.

(1) Law Rep. 9 Eq. 423. (2) 12 Ch. D. 667.
(3) 39 L. J. (Ch.) 188.

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The case is reported, and I must attend to it and deal with it as best I can. I think the Vice-Chancellor in that case fell into an error. I can find no distinction between the case of capacity to alienate existing by reason of a general power and general capacity to alienate property. For the purposes of the power, the person exercising it, whether a man or a married woman, stands in exactly the same position with reference to the disposition purported to be made under the power.

Mr. *Butler* and Lord *St. Leonards* both treat a general power of appointment as outside the rule against perpetuities. Lord *St. Leonards* in his work on Powers says (1): "A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases." He draws no distinction between a power exercisable by deed or will or by will only, and it appears to me to make no difference by what instrument the power is made exercisable. Lord *St. Leonards* also says (2): "Therefore, whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and the period for the commencement of the limitations in point of perpetuity, is the time of the execution of the power, and not of the creation of it." He goes on to quote Mr. *Powell's* note to *Fearne's* Executory Devises (3) in favour of the contrary opinion, and in the result states that there appears to be no solid principle upon which the distinction taken by Mr. *Powell* can be supported, because the question whether the limitations are good does not depend on the fact that the donee of the power has also the fee in default of appointment, and that you can create the same estates and limitations under a general power of appointment as you can where you have the fee.

There are remarks of other text-writers to the same effect, and I refer particularly to those of Mr. *Butler*, who says that this proposition is established "after a series of cases:" *Butler's Coke* upon *Littleton* (4).

(1) 8th Ed. p. 394.
(2) Ibid. p. 395.
(3) Page 5.
(4) 272 a.

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I think, therefore, there must be some error, some slip in the decision of *James*, V.C., in *In re Powell's Trusts* (1), and that the case was wrongly decided, and consequently that I must treat a *feme covert* as capable of creating the same limitations under a general power of appointment as she could under a will of her separate estate. The result, therefore, is, that I hold the appointment by Mrs. *Abdy* valid, and I give judgment for the Plaintiff in the terms asked for by the statement of claim.

Solicitors: *Druces, Jackson, & Attlee; Ingram, Harrison, & Ingram.*

G. M.

In re LORD KENSINGTON. BACON *v.* FORD.

CHITTY, J.
1885
April 21, 22.

*Judgment Creditors—Registration—Omission to re-register within Five Years—Priorities—*1 & 2 *Vict. c.* 110, *s.* 19 [*Revised Ed. Statutes, vol. viii., p.* 372]—2 & 3 *Vict. c.* 11, *s.* 4 [*Revised Ed. Statutes, vol. viii., p.* 424]—3 & 4 *Vict. c.* 82, *s.* 2 [*Revised Ed. Statutes, vol. viii., p.* 631.]

A., *B.*, and *C.* were judgment creditors of *D.* *A.* registered his judgment on the 12th of March, 1840, but never re-registered; *B.* registered his judgment in April, 1842, and re-registered in March, 1848; *C.* registered his judgment on the 18th of March, 1845, and re-registered on the 16th of March, 1850. Questions having arisen as to the priorities of the several judgment creditors, the fund in Court being insufficient for payment in full:—

Held, that on the construction of the statutes 1 & 2 Vict. c. 110, s. 19, 2 & 3 Vict. c. 11, s. 4, and 3 & 4 Vict. c. 82, s. 2, and upon the principle laid down in *Beavan* v. *Earl of Oxford* (2), *C.* was first entitled to take out of the fund the sum found due on *A.'s* judgment, and then that *B.* was entitled to be paid the full amount of his judgment before *C.* took anything more in respect of his judgment.

LORD KENSINGTON by his will dated the 24th of May, 1852, devised all his real and leasehold estates to the Defendants *Ford* and *Edwardes* upon trust for sale, and appointed them executors of his will, which also contained a charge of debts on his real estates.

The testator died in August, 1852, and his will was proved by *Ford* alone in the same month.

The testator's estates were at his death incumbered by way of

(1) 39 L. J. (Ch.) 188. (2) 6 D. M. & G. 492.

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mortgages, annuities and judgments to an amount far beyond their value, and were in the hands of receivers appointed by him and acting on behalf of the first mortgagees.

This suit was instituted in December, 1852, for the administration of the testator's real and personal estate by *Thomas Bacon* who was a registered judgment creditor on the testator's estates.

Divers orders were made and inquiries directed as to the testator's estates, and ultimately, in October, 1881, the chief clerk made his certificate, which contained a schedule of all the registered judgments, amounting to ninety-eight in number, and he also found the priorities of all the mortgages, annuities and judgments, and that the fund in Court then consisted (subject to the payment of costs) of the sum of £4051 18*s.* 4*d.* Bank £3 per cent. Annuities; £59 10*s.* 3*d.* cash, and £1344 10*s.* 3*d.* *India* £4 per cent. stock, all standing to the credit of the action *Bacon* v. *Ford*, and he further found that nine twenty-fifth parts arose from and represented personal estate, and the remainder represented real estate.

On the 10th of March, 1885, the chief clerk made a separate certificate as to the registered judgment creditors' fund, and settled a scheme for the division of the fund, but objections having been taken to the finding by the owners of judgment No. 35 in the schedule, the action was set down on further consideration, and now came on to be heard together with a summons to vary the certificate of the 10th of March, 1885.

The judgments material to the decision of the questions in issue were three, namely, No. 6 in the schedule, being a judgment for £50 which was registered on the 12th of March, 1840, and was never re-registered; No. 35 in the schedule, being a judgment for £4000 which was registered on the 18th of April, 1842, and re-registered on the 16th of March, 1848 (after the expiration of five years), and No. 89 in the schedule, being a judgment for £3289 which was registered on the 18th of March, 1845, and re-registered on the 16th of March, 1850 (within the period of five years).

The chief clerk by the certificate of the 10th of March, 1885, found that the owner of judgment No. 89 was entitled to the sum recovered under judgment No. 6 in priority to the owners of

judgments No. 6 and No. 35, and the owner of No. 35 took out a summons to vary the certificate in that respect.

The question turned principally on the construction of sect. 19 of 1 & 2 Vict. c. 110, sect. 4 of 2 & 3 Vict. c. 11, and sect. 2 of 3 & 4 Vict. c. 82 (1).

(1) 1 & 2 Vict. c. 110, s. 19: "Provided always and be it further enacted, that no judgment of any of the said Superior Courts, nor any decree or order in any Court of Equity, nor any rule of a Court of Common Law, nor any order in Bankruptcy or Lunacy, shall by virtue of this Act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court and the title of the cause or matter in which such judgment, decree, order, or rule, shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs, or moneys thereby recovered or ordered to be paid, shall be left with the Senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and all persons shall be at liberty to search the same book on payment of the sum of one shilling."

2 & 3 Vict. c. 11, s. 4: "Be it enacted that all judgments of any of the Superior Courts, decrees or orders in any Court of Equity, rules of a Court of Common Law, and orders in Bankruptcy or Lunacy, which since the passing of the Act (1 & 2 Vict. c. 110) have been registered under the provisions therein contained, or which shall hereafter be so registered, shall, after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance is again left with the senior Master of the Court of Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years before the right of such creditors accrued, and so, *toties quoties*, at the expiration of every succeeding five years; and the senior Master shall forthwith re-enter the same in like manner as the same was originally entered."

3 & 4 Vict. c. 82, s. 2: "Be it therefore further declared and enacted, that no such judgment, decree, order, or rule as aforesaid shall by virtue of the said Act (1 & 2 Vict. c. 110) affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said Act in that behalf mentioned shall have been left with the senior Master of the said Court of Common Pleas at Westminster; any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in any wise notwithstanding."

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Whitehorne, Q.C., and *C. C. Berkeley*, for the owners of judgment No. 35 in support of the summons to vary :—

Our judgment having been registered on the 18th of April, 1842, and re-registered on the 16th of March, 1848, is entitled to rank in priority before the judgment No. 89, as that judgment was not registered until a date subsequent to the registration of our judgment.

As regards No. 89, we did not lose any priority by reason of our judgment not having been re-registered within five years of the first registration.

Our judgment is entitled to rank in priority over judgment No. 6, which was never re-registered, and as regards that judgment we are entitled to be first paid out of the funds in Court.

We cannot maintain that the judgment No. 6 is void as against us, as it was on the register when we registered in 1842, but we say that as against us the owner of judgment No. 89 cannot take the sum found due on judgment No. 6.

The principle to be applied in this case is the same as in the case of bills of sale. The fact that a bill of sale is set aside as void against the trustee in bankruptcy of the grantor does not entitle the trustee to stand in the place of the grantee, and thus acquire priority over the grantee under a valid bill of sale subsequently executed by the grantor: *Ex parte Leman* (1); *Ex parte Payne* (2); *Edwards* v. *English* (3); *Richards* v. *James* (4). They also referred to the sections of the several statutes above referred to, also to 18 & 19 Vict. c. 15, s. 4, and 17 & 18 Vict. c. 36.

Charles Walker, for a judgment creditor in the same interest.

Romer, Q.C., and *E. Beaumont*, for the owners of judgment No. 89 :—

We submit that the finding of the Chief Clerk is perfectly correct. The principle to be followed in settling the priorities in this case is laid down most clearly in the case of *Beavan* v. *Earl of Oxford* (5). When No. 35 registered his judgment he

(1) 4 Ch. D. 23.
(2) 11 Ch. D. 539.
(3) 7 E. & B. 564.
(4) Law Rep. 2 Q. B. 285.
(5) 6 D. M. & G. 492.

found No. 6 on the register, and according to the decision in *Beavan* v. *Earl of Oxford* (1) No. 6 did not lose his priority over No. 35 by the fact of his having omitted to re-register. When No. 89 registered his judgment he only found No. 35 in front of him, as No. 6 had omitted to re-register within the five years or in fact at all, and No. 35 has no ground of complaint if No. 89 takes, as the Chief Clerk has found he is entitled to take, the £50 due on No. 6 judgment in priority, as under any circumstances No. 6 takes priority over No. 35 notwithstanding his having omitted to re-register.

Whitehorne, in reply.

CHITTY, J.:—

The only point I have to decide is with reference to the construction of the three Acts of Parliament, 1 & 2 Vict. c. 110, s. 19, 2 & 3 Vict. c. 11, s. 4, and 3 & 4 Vict. c. 82, s. 2—Lord *Kensington* having died before the Act of 1855 came into operation. [His Lordship read the several sections above referred to and proceeded:—]

There are no less than ninety-eight judgments registered against Lord *Kensington*; but it will be sufficient for the purposes of my judgment to extract from the long schedule three judgments in order to raise the point. The first is No. 6, which is a judgment for £50, and which was registered on the 12th of March, 1840, the next is No. 35 for £4000, which was registered on the 18th of April, 1842, and the third is No. 89 for £3289, which was registered on the 18th of March, 1845. No. 6 was never re-registered.

The statute 1 & 2 Vict. c. 110, for the first time made a judgment debt an equitable charge on the lands of the judgment debtor, and the two other Acts which I have mentioned were passed for the purpose of affording a certain protection to purchasers, mortgagees and judgment creditors. These two Acts established a system of registration of judgments; they were so framed as to impose an obligation on the purchaser, mortgagee, or judgment creditor to search the register for a period of five years only; they were also so framed as to do away with the

(1) 6 D. M. & G. 492.

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equitable doctrine of notice of the charge, where the charge was not registered, but a judgment that was once registered remained valid as against any purchaser, mortgagee, or judgment creditor who found that judgment on the register during the period for which he was bound to search. These propositions are easily to be ascertained upon a careful reading of the sections, and the last proposition is that which the Court of Appeal established in the course of the case of *Beavan* v. *Earl of Oxford* (1).

Now to deal with the facts of this case. When No. 35 registered his judgment he found No. 6 on the register, No. 6 having been, as I said, registered in 1840 and No. 35 in 1842, and as between these two judgment creditors the order of priority according to date remains fixed by statute. The omission of No. 6 to re-register within the period of five years was immaterial as regards No. 35, and therefore if these two judgment creditors were the only claimants on the fund which now represents the real estate of the judgment debtor, it would be unquestionable that the order of payment would be to pay £50 to No. 6, and then proceed to pay No. 35. No. 35 cannot claim any part of the fund as against No. 6, and therefore the £50 must be paid or set apart or properly dealt with, and No. 35 cannot under the statute complain of any injury to him if that £50 is first taken out of the fund before he, No. 35, shares in the distribution. I now come to No. 89. When he registered on the 18th of March, 1845, searching the register for the period for which only he was bound to search it, he found No. 35 on the register, but he did not find No. 6, because No. 6 had omitted to re-register. The result therefore, is the following rule or proposition, founded on *Beavan* v. *Earl of Oxford*: viz. that the relative positions of No. 35 and No. 89 are fixed in the same manner as the relative positions of No. 6 and No. 35 were fixed, and consequently No. 89 is bound to allow the full amount of No. 35's judgment to be taken out of the fund before he can take any thing in respect of his own judgment. So far the law is settled as between No. 35 and No. 89. But now comes in the question as to the position of No. 6, having regard to the fact that his judgment was not re-registered. Now the statutes are plain, as between No. 6 and

(1) 6 D. M. & G. 492.

No. 89, No. 6 is void. If these were the only two claims, No. 6 would be wiped out altogether, but No. 6 is not wiped out altogether by the statute, because No. 6 is good as against No. 35, because the effect of the statute is to avoid a judgment which is not on the register during the period of five years which I have mentioned. Consequently No. 6 is good as against No. 35, and No. 35 is good as against No. 89, but No. 6 is bad as against No. 89.

Now at first sight it would be said that there is a dead lock; there is a puzzle, and the Legislature has not said how a fund such as there is in this case representing the real estate is to be dealt with. But I find no difficulty in applying the exact propositions derivable from the statute to the case. To apply the language of the Court of Appeal in the case of *Beavan* v. *Earl of Oxford* (1), No. 35 has no ground of complaint if the £50 owing on the judgment No. 6 is first taken out of the fund. I consider the right course to adopt in administering the fund, is to take No. 6 out as against No. 35. Then who is to have it? Not No. 6 because his judgment is void as against No. 89, and not No. 35, because No. 6 is good as against No. 35. Then who can have it? Why No. 89, and for this reason, that No. 6 is void as against him because his judgment was not re-registered.

It is suggested that this is enabling No. 89 to put forward two inconsistent propositions, to avoid No. 6 for one purpose, and to set it up for another in the same proceeding. That to my mind is an error. No. 89 does not advance two inconsistent propositions, but, as is apparent to my mind on a careful perusal of the statutes, he only uses the words which the statute puts into his mouth, he says "No. 6 is void as against me, I admit No. 6 is good as against No. 35. I avoid it by the statute altogether;" that is all I do and I do not injure No. 35. The result of my judgment is, as I have already intimated, in no way to put No. 35 in a worse position, because No. 35 could never claim the £50, the amount of the judgment of No. 6, which is payable out of the fund.

That appears to me to be the solution of propositions which may no doubt, if they are stated in the abstract, and without due

(1) 6 D. M. & G. 492.

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consideration of the various clauses of the Acts of Parliament, appear to be something like a puzzle.

That is the conclusion that I have arrived at, and what I have now stated will dispose of the whole of the case. No. 89 (taking these merely as examples) is entitled to take the £50 which would have fallen to No. 6 but no more, and then comes in No. 35, standing next on the fund, and he takes out the full amount of his judgment before No. 89 takes anything more, and the same observations and the same principles apply to the cases (and there are such cases in the schedule) where the first judgment is more than the third. The third can of course only take out of the first judgment to the extent of his own claim, and if his claim exceeds the amount, as it does in the case of the three specific examples that I have taken, then of course he can only take the amount of the first.

The result is that I think the Chief Clerk has arrived at a proper conclusion.

Solicitors: *Berkeley & Callcott*; *Finch, Jennings, & Finch.*

G. M.

SCOTNEY *v.* LOMER.

NORTH, J.

1885

March 21, 23, 24.

[1883 S. 1494.]

Will—Life Interest—Remainder—Absolute Interest—Power of Appointment to second Set of Trustees—Wilful Default.

A testatrix by her will appointed two-fifths of certain property to trustees upon trust to pay the income to her son until he should attain the age of forty years, and then to hold the same in trust for her son his executors and administrators; provided that in case her son should assign his share in the property, then the aforesaid bequests should be void, and the two-fifths should be held upon the trusts declared as to the other three-fifths. The son died before he attained the age of forty without having assigned:—

Held, that the two-fifths vested in trust for the son absolutely so as to pass by his will.

Property was assigned to trustees on trust for *S.* for life, and after her death to such of her issue as she should by will appoint; the settlor and *S.* during their joint lives, and the survivor, had a power of appointment of new trustees and discretion as to the investments, and the settlor had a power of revocation, which however he did not exercise. *S.* by her will appointed to *B.* and *N.* the property as trustees for her son. After her death the settlor appointed *L.* and *N.* trustees of the settlement, and the property was transferred to them. The son of *S.* died, and *B.* died. *L.* had allowed the property to remain in the hands of *N.*, who had made away with it.

The persons beneficially entitled under the will of the son recovered judgment for the property made away with against the executor of the son on the ground of wilful default. The executor brought an action against *L.* for the property as having been lost by his wilful default in allowing it to remain in the hands of *N.*:—

Held, that *S.* had power to appoint the property to trustees for her son; that as he took the whole beneficial interest the trustees of the settlement had no duties to perform except to hand the property over to the surviving trustee of the will; that therefore *N.* was rightfully in possession of the property, and *L.* was not liable for having allowed it to remain in the hands of *N.*

In re Pocock's Policy (1), *Ferrier* v. *Jay* (2), and *Busk* v. *Aldam* (3), observed upon.

Held, that as the persons entitled under the will of the son of *S.* had chosen to proceed and recover against his executor, the executor could recover again from the trustee of the settlement if he had been guilty of wilful default.

By an indenture of settlement dated the 27th of September, 1849, *Wilson Lomer* assigned and covenanted to assign certain

(1) Law Rep. 6 Ch. 445. (2) Law Rep. 10 Eq. 550.
(3) Law Rep. 19 Eq. 16.

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property, sums of money, and securities to *C. Simonds* and *A. P. Greene*, who were to hold the trust funds upon trust either to permit the same to remain as then invested, or, with the consent in writing of *Wilson Lomer* and *Louisa Sowdon*, or the survivor of them, and after the death of the survivor at the discretion of the trustees to alter the investments; and the trustees were during the life of *Louisa Sowdon* to pay the annual produce of the trust funds to her for her separate use, and after her death were to hold the same in trust for all or such one or more exclusively of the others or other of the issue of *Louisa Sowdon* "in such shares and with such future or other executory or other trusts for the benefit of the said issue or some or one of them, with such provisions for their maintenance, education, or advancement either at the discretion of the trustees or trustee for the time being of these presents, and upon such conditions and with such restrictions and in such manner as" *Louisa Sowdon* should by will appoint. And it was thereby declared that it should be lawful for the said *Wilson Lomer* and *Louisa Sowdon*, or the survivor of them, to appoint any person or persons to be a trustee or trustees of the settlement in the stead of the trustees thereby appointed or therein mentioned. The indenture also contained a power (which was not exercised) to *Wilson Lomer* (but without prejudice to any previous exercise of any of the powers thereinbefore contained) to alter, revoke, or make void all or any of the trusts thereinbefore declared.

Louisa Sowdon died in 1858, having by her will appointed that the funds subject to the trusts of the settlement should after her death be held by *Harry Sowdon* her husband and *William Henry Newman*, as to three-fifths thereof, upon certain trusts for the benefit of her daughter *Catherine Sowdon*, afterwards *Catherine White*; and as to two-fifths thereof "upon trust to pay the interest, dividends, and annual income thereof by quarterly payments, or in such other manner as my said trustees or trustee shall think proper unto my son *William Henry Sowdon* until he shall attain the age of forty years, and when and as soon as he shall attain that age, then I direct that the said trust moneys, stocks, funds, and securities shall be held by my said trustees, or the trustees or trustee for the time being of my will, in trust for my said

son *William Henry Sowdon*, his executors and administrators; Provided always, and I declare, that it shall not be lawful for my said son to sell, assign, aliene, incumber, charge, dispose of, or otherwise part with by way of anticipation or otherwise (except by will) his said share of the said trust moneys, stocks, funds, and securities, or part or parts thereof, the interest, dividend, and annual income thereof, or any part or parts thereof, so to him payable as aforesaid; and, notwithstanding such charges, sales, assignments, or other dispositions, it shall be lawful to and for my said trustees for the time being, and they and he are and is hereby required, to pay the interest, dividends, and annual produce thereof into the proper hands of my said son for his separate use and benefit upon his own receipt: Provided also, that in case my said son shall at any time sell or assign, or otherwise part with, or attempt to sell or assign or part with his said share of and in the said trust moneys, stocks, funds, and securities, then I direct and appoint that the appointment hereinbefore made to him of the said two-fifth parts of the said trust moneys, stocks, funds, and securities, and the interest, dividends, and income thereof, shall immediately thereupon be void and of no effect, and then and in that case I do hereby direct and appoint that the same share of the said trust moneys, stocks, funds, and securities, and the interest, dividends, and income thereof shall be held by my said trustees and trustee upon the trusts and for the intents and purposes hereinbefore expressed and declared for the benefit of my said daughter *Catherine Sowdon* and her assigns with reference to the other three-fifths of the said stocks, funds, and securities hereinbefore appointed to her as aforesaid." *Harry Sowdon* and *W. H. Newman* proved the will; and soon afterwards *Harry Sowdon* died, leaving *Newman* the sole trustee of the will.

In 1866 *Wilson Lomer* appointed *Edward Lomer* and *William Henry Newman* trustees of the indenture of settlement in the place of *Simonds* and *Greene*, the original trustees; and all the funds and property subject to the trusts of the settlement were transferred to *Edward Lomer* and *William Henry Newman*.

William Henry Sowdon died in 1869 under the age of forty years, having by his will devised and bequeathed all his estate and effects to *William Best* and *E. S. Halladay* upon certain

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trusts, and he appointed *Best* and *Halladay* executors of his will. *Halladay* was a clerk of *Newman's* and died in 1881.

The three-fifths appointed to *Catherine White* appeared to have been transferred to the trustees of her marriage settlement; but *Edward Lomer* had allowed *Newman* to have possession of the funds representing the two-fifths bequeathed on the trusts for *William Henry Sowdon*. *Newman* misappropriated these funds, and his estate was wholly insolvent. In December, 1881, he presented a petition for liquidation. *Wilson Lomer* had died in 1877.

The persons beneficially entitled under the will of *William Henry Sowdon* brought an action against *Best* for negligence and wilful default in allowing the trust funds to remain outstanding, and obtained judgment accordingly. On the account being taken, the estate of *Best*, who had died during the proceedings, was found liable for upwards of £5000.

Scotney as *Best's* executor brought this action against *Edward Lomer* and *William Henry Newman* praying a declaration that they were jointly and severally liable to make good and restore the trust funds made away with.

W. W. Karslake, Q.C., and *S. Dickinson*, for the Plaintiff:—

Edward Lomer as trustee of the settlement is clearly liable unless he can shew that he rightfully parted with the property, which might be the case if Mrs. *Sowdon's* will amounted to an absolute appointment to trustees for her son. But she had not power under the settlement to appoint to other trustees, the power being special: *Busk* v. *Aldam* (1); *Ferrier* v. *Jay* (2); *Fowler* v. *Cohn* (3); *Thornton* v. *Bright* (4); *Cowx* v. *Foster* (5); *Trollope* v. *Linton* (6). Besides, the will of Mrs. *Sowdon* does not give an absolute interest to her son as it was defeasible: *Batsford* v. *Kebbell* (7). There were duties for the trustees of the settlement to perform, and they could not rightly allow *Newman* as trustee of the will to have possession of the property. There were powers of investment and of revocation left in the settlor.

(1) Law Rep. 19 Eq. 16.
(2) Ibid. 10 Eq. 550.
(3) 21 Beav. 360.
(4) 2 My. & Cr. 230.
(5) 1 J. & H. 30.
(6) 1 S. & S. 477.
(7) 3 Ves. 363.

Barber, Q.C., and *Maidlow*, for *Edward Lomer*:—

On the construction of Mrs. *Sowdon's* will the property went to her trustees for her son absolutely: *In re Bunn* (1); *In re Hart's Trusts* (2); *Pearson* v. *Dolman* (3). There was therefore absolutely nothing left for the trustees of the settlement to do but realise and hand over the money to the trustees of the will, *Lomer* and *Newman*: *Hayes* v. *Oatley* (4). *Edward Lomer* therefore was right in letting *Newman* have the funds. Mrs. *Sowdon* had power to substitute her trustees for the original trustees: *Farwell* on Powers (5). In *Busk* v. *Aldam* (6) the power was special, not, as here, general. *Thornton* v. *Bright* (7), *Trollope* v. *Linton* (8), and *Ferrier* v. *Jay* (9), are all to that effect. *Cowx* v. *Foster* (10) was a very strong case. The whole subject is discussed in *Davidson's* Conveyancing (11).

Another ground of defence is this. *Best* has been found by the Court guilty of wilful default, and how can the executor of the man whose gross negligence caused the loss of the money turn round and be relieved at the expense of another man. If *Best* had done his duty, the money would probably have been saved. One trustee who has been guilty of breach of trust can never recover against another, as having been equally or more guilty.

[NORTH, J.:—When *Best's* executor has paid his *cestuis que trust*, can he not recover?]

There was no contract or privity between *Best* and *Lomer*, and *Lomer* owes no duty to *Best*.

W. W. Karslake, in reply:—

Unless Mrs. *Sowdon* had absolute power to dispose of the property, and there was nothing left for the trustees of the settlement to do, she could not give it to her trustees. But there was no appointment to *W. H. Sowdon* unless he attained the age of forty.

(1) 16 Ch. D. 47.
(2) 3 De G. & J. 195.
(3) Law Rep. 3 Eq. 315.
(4) Ibid. 14 Eq. 1.
(5) Page 252.
(6) Law Rep. 19 Eq. 16.
(7) 2 My. & Cr. 230.
(8) 1 S. & S. 477.
(9) Law Rep. 10 Eq. 550.
(10) 1 J. & H. 30.
(11) 3rd Ed. vol. i. pt. i. p. 158.

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There are two gifts by the will—the income till he attains the age of forty, liable to be divested, and the principal. If he did not take under the will he takes under the settlement as in default of appointment, so that in any case his executor takes, but in the latter event the trustees of the will have nothing to do with it. The gift does not amount to an absolute gift: *Wadley* v. *North* (1). Where for personal reasons the vesting of a gift is postponed, it will not take effect until the time appointed: *Jarman* on Wills (2); *Kearsley* v. *Woodcock* (3). Until *W. H. Sowdon* attained the age of forty he could not call on the trustees to hand over the money, and now, after his death, his executors ask the trustees of the settlement for it. *Newman*, as executor of the will, could not during *W. H. Sowdon's* life have called on *Edward Lomer* to hand over the funds, and after the death of *W. H. Sowdon* his executor was the only person who had a right to receive it.

NORTH, J.:—

This is an action for the purpose of making two Defendants, one of whom is represented here, and is at the utmost only liable for not having a fund in his hands, responsible for a sum of nearly £6000. [His Lordship then stated shortly the facts of the case; and said that the first thing to be decided was the construction to be put on the will of *Louisa Sowden*. His Lordship then read the important parts of the will, and said that if the clause of bequest to *William Henry Sowdon* had stopped after the direction that the trust fund was to be held by the trustees for him, there could be no doubt as to the interest which he would take; the case coming clearly within the decision of *In re Bunn* (4); *In re Hart's Trusts* (5) not being governed by *Batsford* v. *Kebbell* (6).]

But, looking at that bequest, it appears to me to be an absolute and complete disposition of the two-fifths. Because even if the first gift of the income to the son till forty, and afterwards of the capital, did not give in itself an absolute vested interest, and left something disposable by the words in the subsequent clause, still

(1) 3 Ves. 364.
(2) 4th Ed. vol. i. p. 837.
(3) 3 Hare, 185.
(4) 16 Ch. D. 47.
(5) 3 De G. & J. 195.
(6) 3 Ves. 363.

the gift over to Mrs. *White* would only take effect in the same way as the gift of the three-fifths, and therefore there would be an absolute disposition by this will so as to leave nothing to be done by the trustees of the settlement as regards the beneficial interest. It does not seem to me necessary to decide the question whether the proviso that the son shall never part with or aliene his share is good so as to cut down the previous gift of the life interest, or is not good; because, assuming the meaning to be that the life interest has been limited until he attained the age of forty, or parted with the interest, the utmost it would come to is, that there is in the events which have happened an absolute estate and interest vested in him by the will. That at least is the construction which I put upon it. It is subject, at the utmost, to the possibility of his interest being defeated in favour of his sister, in case he did dispose of it before he attained the age of forty years. That construction seems to me to be quite clear, not only from the case of *In re Bunn* (1), but also from the cases of *Pearson* v. *Dolman* (2), and *Webb* v. *Sadler* (3). In the last case the gift was this: "Husband and wife having under their marriage settlement a joint power of appointment over personalty in favour of the children of the marriage, of whom there were three survivors, appointed one-third of the fund to trustees upon such trusts as *H.* (one of the sons) by deed, executed with the consent of the father during his life, and after his death with the consent of the trustees of his will, or by will, should appoint, and in default of such appointment. . . . ." The first thing decided was that the attempt to limit the power of the son by associating somebody with him was bad; and, secondly, that that part of the appointment being bad, did not prevent the limitation over being good. Then the limitation over was this: "In default of such appointment, upon trust for *H.* for life, or until bankruptcy or assignment (such bankruptcy or assignment being limited to twenty-one years after the death of his surviving parent); and after *H.'s* death, upon trust for his executors or administrators, as part of his personal estate; but if such interest should be previously determined, then upon the trusts therein mentioned." The construction put upon

(1) 16 Ch. D. 47. (2) Law Rep. 3 Eq. 315.
(3) Law Rep. 8 Ch. 419.

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that by the Court of Appeal was that it came to precisely the same thing as if the limitation had been to him and his executors or administrators, and the Court held that after twenty-one years from the death of the survivor of the father and mother, and provided that the son during that time did not become bankrupt or aliene, he was absolutely entitled to his share of the personalty, and to a share of the realty also, that is to say, that subject to the possibility of defeazance the share was absolutely his and vested at once. So in the present case the conclusion I come to is that, subject possibly to the defeasibility of the gift in favour of Mrs. *White*, the share was absolutely vested in *William Henry Sowdon* from the first. This possibility of defeazance came to an end on his death, because, although he died under the age of forty, yet the defeazance did not take effect, and it could not take effect after his death; therefore the vested interest he had had all along remained in him free from any possibility of defeazance. The trusts, therefore, of this will, as I construe it, were that the property was vested in trustees, who are named, on trust as to three-fifths, in certain events that have happened, absolutely for Mrs. *White*, and as the rest of the property, in the events that have happened, for *William Henry Sowdon* absolutely.

The next question is whether (this being the true construction of the will, and the will having given the fund to the trustees of the will), it was in Mrs. *Sowdon's* power to make the trustees of her will trustees of the fund. With that in view it is necessary to examine the trusts of the settlement:—[His Lordship then read parts of the settlement, including the power of revocation which had not been exercised, and in his Lordship's opinion could not have been exercised after Mrs. *Sowdon's* death, and therefore did not affect the case.]

The only other things which have been suggested as standing in the way of such power are the powers reserved to *Wilson Lomer* after the death of Mrs. *Sowdon*, in case he happened to survive her, to control the variation of investments, and to appoint new trustees. I put one case this morning to the counsel for the Plaintiff, that Mrs. *Sowdon* might have appointed her entire property, without the intervention of trustees, to a child absolutely, and I asked whether it could be contended that a power given

to *Wilson Lomer* to appoint trustees would prevent that child receiving the property immediately after his mother's death and at any time before the death of *Wilson Lomer*; and it was conceded at once, and I think quite properly, that if Mrs. *Sowdon* had appointed absolutely to a son who was twenty-one and ready to take the fund on her death, he would have been entitled to have that fund handed over to him, and his right to receive it could not have been kept in suspense by the powers to *Wilson Lomer* to consent to a variation of investments or to appoint new trustees. In other words *Wilson Lomer* was entitled to have the power of appointing trustees after his daughter's death only in the event of there being trusts to be performed, because if all the trusts had really come to an end there was nothing to appoint trustees of. I find, therefore, nothing in the settlement to limit the power of Mrs. *Sowdon* to appoint by her will in favour of her two children by appointing to trustees in trust for those children.

Then it is said that the effect of this is, that the new trustees are substituted for the original trustees, and the question is whether that was authorized by the terms of the power. It seems to me that it was. Several cases which have been referred to, settle the law beyond all question. Suppose there were a power to appoint to a child, or children, or to a class, then that power might be exercised by appointing the fund to trustees in trust for those children, and if it was real estate it might be validly appointed to trustees who are not objects of the power, on trust to sell and divide the proceeds amongst the objects of the power, but whether such an exercise of it would be a legal exercise of the power or not, seems not quite clear. In *Trollope* v. *Linton* (1) there are certain words used which point to such an appointment as being a legal appointment; but the point did not arise there, inasmuch as there was a mere covenant to settle which could not affect the legal estate, and I observe that the words of the learned Judge are not given. There is merely a short note of what he decided, and it may well be that the note does not accurately express all that he said; and that it was not a decision that the appointment would confer a legal estate. *Kenworthy* v. *Bate* (2) does not throw any light upon it, because all that was done there

(1) 1 S. & S. 477. (2) 6 Ves. 793.

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was a declaration that the power was well exercised, not saying how, and a direction that there should be a sale, and that all proper persons should convey. As regards *Thornton* v. *Bright* (1), it appears to me that, as reported, the words are large enough to shew that it might be a legal exercise of the power, because there are directions as to what the trustees shall do with the rents, and I do not see how the trustees could get the rents unless there was some legal exercise of the power. But I do not think it necessary to discuss that point. The question whether a legal power could be conferred in such a way has been doubted in a recent case of *In re Pocock's Policy* (2), and in the judgment of Vice-Chancellor *Malins* he points out that such a power could only be validly exercised in equity, and could not be a legal exercise of the power. Before the Court of Appeal the point did not arise, and nothing therefore turns on their decision upon it. But that it would be a good equitable exercise of the power seems to me to be clearly settled by the cases of *Cowx* v. *Foster* (3) and *Fowler* v. *Cohn* (4), because the person who had a power to appoint to a child or children in that way, was held to have a power to appoint to trustees, and to indicate the trusts upon which those persons should hold for the children, and that was a good appointment. This, therefore, would be a good appointment to trustees of Mrs. *Sowdon's* own selection for the benefit of the children whom she was intending to benefit by her will.

There were two recent cases cited, decisions of Vice-Chancellor *Malins*, *Ferrier* v. *Jay* (5), and *Busk* v. *Aldam* (6). Now as regards the first case there were two points; one was whether a general gift of all the real and personal estate which the testatrix had power to appoint to trustees to pay debts, and then to divide the residue between the objects of a special power, passed to persons who were objects of the special power, and it was held that it did, following *Cowx* v. *Foster*. A second point was raised by the special case there, namely, who in that case were the proper trustees to hold the fund for the objects in whose favour the appointment was exercised beneficially. There there were

(1) 2 My. & Cr. 230.
(2) Law Rep. 6 Ch. 445.
(3) 1 J. & H. 30.
(4) 21 Beav. 360.
(5) Law Rep. 10 Eq. 550.
(6) Ibid. 19 Eq. 16.

two sets of trustees, the trustees of the original will, and the trustees of the will exercising the power. The case was a special case. Nothing was said against the competency of either set of trustees; but inasmuch as there was a question which of the two sets of trustees ought to hold the fund, the question was put to the Court: Who were the trustees to carry out the trust of the appointed fund? The point was submitted. It was not argued. Neither side wished to hold the fund, but would rather leave it to the other, and all that was required was, that a direction of the Court should be given who should have the fund. The Vice-Chancellor said (1): "Upon the question as to which trustees are to carry out the trusts of the appointed fund, I must again follow the decision in *Cowx* v. *Foster* (2), and direct that the trustees of *Mary Ferrier's* will are the proper persons." Now as regards that, the point did not arise in *Cowx* v. *Foster*. There were not two sets of trustees in that case. It was not following that case to say that the trustees of the second will should have the fund. In *Busk* v. *Aldam* (3), Vice-Chancellor *Malins*, referring to *Ferrier* v. *Jay* (4) said: "I did also in that case undoubtedly say that the second trustees were the most fit persons to have charge of the fund." But the Vice-Chancellor there was under a misapprehension. That was not what he had said, and he put it on a case which did not decide the point. It was simply a question which set of trustees should hold the fund. Neither set of trustees cared so long as they were told by the authority of the Judge which it ought to be, either one set or the other. That, therefore, is not a decision which in any way assists me on this occasion.

[His Lordship then stated the facts in *Busk* v. *Aldam*, and said that the report did not state fully what the limitations were. His Lordship had sent for and had obtained the bill in that case, from which it seemed to him that the limitations disposed completely of the funds.] The bill in that case was filed by the trustees of the second will, asking to have the fund handed over to them by the trustees of the first will. The Vice-Chancellor declined to direct such a transfer. He said that such an

(1) Law Rep. 10 Eq. 553.
(2) 1 J. & H. 30.
(3) Law Rep. 19 Eq. 16, 21.
(4) Ibid. 10 Eq. 550.

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appointment as was made by the second will, and such as was made in the present case, was a valid exercise of the power of appointment, and the appointment to the trustees or trustee was just as good as if it had been made directly to the other objects of the power. Then he pointed out that the bill was filed to have the fund transferred by the first set of trustees to the second; and said (1): "For what object this is desired I cannot understand. It is said that it would be very convenient to have the fund placed in the hands of the trustees. But I cannot look at that. I must consider what was intended to be done by the original testator; and I can see that such a transfer as is asked would violate his intention. I asked Mr. *Cookson* whether he contended that a mere appointment of new trustees by the donee of the power would have been valid, and he pressed upon me that, on the authority of the cases cited, the Court was bound to hand over the fund to the new trustees." That is to say, as I understand it, the argument was that if the person who was a donee of the power had purported to appoint new trustees, and did nothing else, the appointment would have been good. In my opinion it would not, and the argument upon which it seemed to be rested seems to me not sound. He then referred to the cases I have mentioned, and distinguished those, saying that they were cases where there was real estate to be converted, and no person appointed to exercise the conversion, and it was decided that an appointment to trustees to sell and convert and distribute the proceeds amongst the objects of the power was a valid execution of the power. Then he says: "But I am unable to see how that can be an authority for taking away a fund from trustees who are fit and proper, and handing it over to others who may not be so fit, in a case where the duty of the trustees is simply to hold the fund. I am asked to treat these cases as establishing a general law, that where, in all cases, a fund is settled upon trust for a mother for life, and then upon trust for her children as she should appoint, and she appoints to trustees for her children, the first trustees are bound to hand over the fund to the trustees appointed by the daughter. Here nothing more is required than that someone should hold the fund, and it is suggested that I am bound to hand it over to

(1) Law Rep. 19 Eq. 20.

the second trustees." Then he refers to *Ferrier* v. *Jay* (1) and *Cowx* v. *Foster* (2) on the first point, which is immaterial now, and upon the second he says: "I did also in that case undoubtedly say that the second trustees were the most fit persons to have charge of the fund; but I did not say that where it was a mere question which of two sets of trustees should hold a particular fund, the Court would necessarily hand it over to the second set in point of date." Now, it seems to me that what the Vice-Chancellor was asked to decide there really was that it was more convenient that the second set of trustees should have it, but he was asked to say that there was a general rule that the fund should be handed over to a second of two sets of trustees.

The questions I have to decide are in my opinion these:—first of all is there a power on the part of the donee to appoint the fund absolutely to trustees for two children in whose favour an exhaustive disposition is made, leaving nothing over which anyone could take under the original settlement; and, secondly, if there is such a power, has it been exercised?

It seems to me that the cases shew clearly that there was a power for Mrs. *Sowdon*, in appointing to her children, to appoint to trustees for the benefit of those children; and that that was a complete disposition of the fund, so as to make those trustees trustees of the fund; and there being no trust left for the old trustees to perform, and all the trusts to be performed being in the new trustees, that the new trustees, that is to say, the trustees of the will, were entitled to have the fund handed over to them; and, therefore, that this was a good appointment, and was authorized by the terms of the original settlement.

Then it is said that after Mrs. *Sowdon's* death a new appointment of trustees was made by which the Defendants became trustees of the original settlement, and that they exercised those trusts, and that they could not be heard to say that they were not trustees of the settlement. That seems to me quite correct. I concur in that altogether, but what was the trust remaining? What were the trusts upon which they held the fund? It seems to me they were trustees of the fund for the purposes limited by the will of Mrs. *Sowdon*, and nothing else, because there was

(1) Law Rep. 10 Eq. 550. (2) 1 J. & H. 30.

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nothing else left of which they could be trustees; and therefore as soon as they had received the trust fund under the original settlement and were asked by the trustees of Mrs. *Sowdon's* will to hand the fund over to them, they had no course open to them but to hand it over. I do not forget that the trustees of the settlement were *Lomer* and *Newman*, and that the trustee of the will was *Newman* alone. But assuming that instead of being *Newman* it had been *A.* and *B.*, it seems to me clear, that for the reasons I have mentioned, *A.* and *B.* could have called on *Lomer* and *Newman* to transfer the fund, and the fact that *Newman* was one of the trustees did not in any way disentitle him to do what *A.* and *B.* would have been entitled to do.

It was suggested that the Court would not order a fund to be paid to a single trustee. That is quite true. The Court itself being a trustee, will not except in a very special case part with the fund without seeing that the number of trustees is more than one, where there has been more than one trustee originally; but the death of one of two trustees does not incapacitate the other trustee from giving a good receipt for trust funds paid to him, or more, from bringing an action for and recovering trust funds if he can do it without coming to the Court of Chancery to have the funds paid to him. Under those circumstances it appears to me that *Newman* was entitled to have the fund transferred by *Edward Lomer*, and *Lomer* would not have been justified in refusing to do so. In other words, when he did make the transfer by which *Newman* got the fund handed over to him he was only doing what *Newman* had a right to call on him to do, and what *Edward Lomer* was under no liability whatever for not doing. Therefore the view I take is, that although by executing the settlement *Lomer* and *Newman* undoubtedly accepted the trust, yet they have performed their trust when they paid the fund to the person who was entitled to call upon them to do so.

There were two other points raised by Mr. *Barber* which it is not necessary for me to decide now, but which I do not like to pass over. It was contended in the present case there had been an action against *Best's* estate in which the *cestui que trust* under *W. H. Sowdon's* will had obtained judgment against him for wilful default in respect of these very same funds. In fact it

was said that inasmuch as a breach of trust had been committed by *Best*, whom *Scotney* represents, and at the utmost a breach of trust had been committed by *Edward Lomer*, *Best's* representative could not proceed against another trustee to obtain an indemnity against the breach of trust when both had been guilty of breaches of trust. I do not follow that, and for this reason: *Edward Lomer* and *Newman* were trustees for *W. H. Sowdon*, and assuming that they were liable for the fund, they were liable to *Sowdon's* estate. *Best* was the trustee and executor of *Sowdon*. It was *Best's* duty to get in this fund from *Lomer* and *Newman*. *Best* omitted to do so for ten or twelve years. As a matter of fact, he was guilty of neglect in not getting in that fund, and the result was that the beneficiaries under *Sowdon's* will were entitled to say that *Best*, who was their trustee, had been guilty of wilful neglect and default, and was personally liable to them for the fund. They might if they chose have gone to *Lomer* and *Newman*, and have asked them for the fund, but they did not do so. They were content to proceed against *Best*, and they obtained this judgment against him. Now the argument was, that *Sowdon's* trustees had taken the remedy they wished to take, which was against *Best*, and they had not sued, and were not suing, *Lomer* and *Newman*, the persons responsible for the fund; and it was said that because they had chosen to take that course, *Best*, who had been guilty of wilful neglect and default, was incapacitated from proceeding to recover the fund from the persons who were liable for the fund; that is to say, that because a trustee has omitted for several years to get in a fund that he ought to have got in, he therefore has lost the right to get it in when he is charged with not having got it in and is made liable accordingly. In other words, it would come to this, that *Sowdon's* beneficiaries might have elected to proceed against their trustee who had not realized the fund instead of going against the persons who had done so, and that their election to treat the man who had not the fund as liable for it for wilful default amounted to a bar to that person applying to the persons who had the fund and recovering it from them. It does not seem to me that this argument can prevail. I do not think there would have been any difficulty

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whatever on the part of the Plaintiff in recovering here but for the preliminary questions which I have disposed of already.

Then there was a further point raised. It was said *Best*, whom *Scotney* represents, had approved of the transfer of the fund to *Lomer* and *Newman*, and, therefore, *Scotney*, who represents him, could not be heard to complain of that at all. But *Scotney*, although *Best's* representative, is legal personal representative by devolution of *Sowdon*, and this action is brought for the purpose of recovering the fund for *Sowdon's* estate; and it seems to me that this objection therefore is not good.

I cannot, therefore, accede to the arguments of the Defendant on these two points; but I did not like to pass them over without saying a word upon them, as they were fully argued. But upon the main question I must say, in my opinion, that *Edward Lomer* is not liable, and, therefore, as against him the action must be dismissed with costs.

Judgment was given against *Newman*, who did not appear.

Solicitors for Plaintiff: *Stocken & Jupp.*
Solicitors for Defendant: *Lambert, Petch, & Shakespear.*

C. M.

In re WRAGG'S TRADE-MARK.

PEARSON, J.

1885 Feb. 16.

Trade-mark—Registration—Rectification of Register—Application after expiration of Five Years—Indefeasible Title—"Common to the Trade"—"Three Marks Rule"—Patents, Designs, and Trade-marks Act, 1883 (46 & 47 *Vict.* c. 57), *ss.* 74, 76, 90.

The registration of a mark as a trade-mark and the lapse of five years do not, under s. 76 of the *Trade-marks Act*, 1883, confer on the person who has made the registration an indefeasible title to the use of the mark as a trade-mark if, by reason of its being at the time of registration in common use in the trade, it ought not to have been registered.

The lapse of five years cannot make good a registration which was in its inception invalid.

A trade-mark which was originally improperly registered ought, even after the lapse of five years, to be removed from the register, because the registration might enable the person who has made it to commit a fraud.

Held, that a mark which had been registered as a trade-mark, was, at the time of registration, "common to the trade" because similar (though not in each case identical) marks were then in use by more than three persons engaged in the same trade, although in some of the cases the mark was not actually placed on the goods, but was only used on bill-heads, trade circulars, advertisements, or show-cards.

THIS was a motion by *William Thorne*, a manufacturer of, and dealer in aerated waters, at *Birkenhead*, asking that the register of trade-marks might be rectified by removing therefrom the Trade-mark, No. 2176.

The mark had been registered as a new mark, not used before 1875, on the 12th of February, 1876, by *Job Wragg*, a manufacturer of mineral and aerated waters at *Birmingham*, as applicable to that description of goods. The mark consisted of a syphon bottle, with a hand pressing down the tap handle, and a glass on the opposite side into which the liquid was flowing from the spout. This was surrounded by a circular border, upon which were printed the words "*J. Wragg, Birmingham.*"

Thorne, on the 25th of June, 1883, purchased from the trustee in the liquidation of *William Bruce*, who had traded at *Birkenhead* as *William Bruce & Co.*, the goodwill of his business of a manufacturer of aerated waters, including the right to use his trade-mark. This mark consisted also of a syphon, hand, and glass,

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and it had been used continuously by *Bruce* from the year 1872. Evidence was given by *Thorne* of the continuous use of similar marks by five other persons or firms engaged in the same trade, the use commencing in each case from a date before the year 1875. In one of those cases the mark consisted only of a syphon and glass, without a hand, and in another of a syphon and hand, without a glass. In some of the cases the device had been used only on bill-heads, invoices, trade circulars, advertisements, or show cards, and had not been applied to the bottles containing the mineral water, by means of labels or otherwise. *Thorne*, on the 16th of July, 1883, registered the mark which he had bought from *Bruce's* trustee as a trade-mark, believing at that time that *Bruce* had been entitled to the exclusive use of it. *Wragg* afterwards commenced an action against *Thorne*, claiming to restrain him from using his mark, as being a violation of *Wragg's* exclusive right. *Thorne* then moved to rectify the register, and he offered at his own expense to procure the registration of his own mark to be vacated.

In 1884 *Wragg* brought an action against *James Trentham*, one of the persons who had used a similar mark for eighteen years, to restrain him from so doing. On the 7th of August, 1884, *Trentham* wrote a letter to *Wragg* admitting that he had been wrong in using the mark, apologising for having done so, and promising to discontinue the use of it, and *Wragg* accepted this letter in settlement of the action, *Trentham* paying the costs of the action.

Cozens-Hardy, Q.C., and *Sebastian*, for the motion :—

At the time of the registration by *Wragg* the mark was in common use, *i.e.*, more than three traders in the same business were using marks which were in substance the same as this mark. The rule which is known as the "three marks rule," was originally laid down by the Commissioners of Patents, but it was recognised by the Courts in a number of cases before the *Trade-marks Act* of 1883 was passed: *In re Walkden Aerated Waters Company* (before *Jessel*, M.R., June 8, 1877) (1).

(1) Seb. Dig. 332.

[PEARSON, J.:—The cases are all collected in Mr. *Sebastian's* Book on the Law of Trade-Marks (1).]

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In re Hyde & Co.'s Trade-mark (2); *In re Leonardt* (*Jessel*, M.R., April 12, 1878) (3); *In re Jelley, Son, & Jones' Application* (4); *In re Leonard & Ellis' Trade-mark* (5); *Benbow* v. *Low* (6). The rule has now, by sub-sect. 3 of sect. 74 of the *Trade-marks Act* of 1883, acquired statutory force. In *In re Lloyd & Sons' Trade-mark* (7), *Chitty*, J., expressed an opinion that for this purpose it was immaterial whether the case came under the Act of 1883 or under the Act of 1875. If *Wragg's* mark remains on the register he will be able to sue all the persons who use the same mark, though they may have used it as long as he has or even longer. Though sect. 76 of the Act of 1883 makes the registration, after the expiration of five years from the date of registration, conclusive evidence of the right of the person who is on the register to the exclusive use of the trade-mark, that is qualified by the words "subject to the provisions of this Act," and sect. 90 enables the Court to expunge any entry in the register which has been made "without sufficient cause." The fact that the mark has been on the register for more than five years does not prevent rectification, if it never ought to have been placed there at all: *In re J. B. Palmer's Application* (8); *In re Lloyd & Sons' Trade-mark.* This mark, being in common use at the date of registration, ought not to have been registered, and, moreover, it is not such a distinctive device as can legally constitute a trade-mark.

Aston, Q.C., and *Macrory*, for *Wragg*:—

This is an attempt entirely to nullify the provision of the Act as to the effect of five years' registration.

[PEARSON, J.:—How can that provision have any operation when two marks, exactly similar, are on the register; the proprietor of each would have an exclusive right.]

(1) 2nd Ed., p. 312.
(2) 7 Ch. D. 724.
(3) Seb. Dig. 373.
(4) 51 L. J. (Ch.) 639, n.
(5) 53 L. J. (Ch.) 233.
(6) 44 L. T. (N.S.) 875.
(7) 27 Ch. D. 646.
(8) 21 Ch. D. 47.

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Each of them would have an exclusive right against all the world but the other. In *In re Hyde & Co.'s Trade-mark* (1) the mark which had been registered had ceased for many years to be a trade-mark, and yet *Jessel*, M.R., said that it was necessary to apply for the rectification of the register in order to prevent an absolute title being acquired by five years' registration. In *In re Leonard & Ellis' Trade-mark* (2) it was not said that, if the mark was one which in its nature could have been properly registered, the person who was on the register would not acquire an absolute title by five years registration.

The mark is *primâ facie* a distinctive trade-mark, and this distinguishes the present case from *In re J. B. Palmer's Trade-mark* (3), and *In re Leonard & Ellis' Trade-mark*, in which cases the words which had been registered were only words of description and never could have been a trade-mark. In *In re Hyde & Co.'s Trade-mark*, *Jessel*, M.R., said (4), that "persons who register under the Act, and whose title is not impeached within five years, acquire an absolute title to a trade-mark to which they may not have been previously entitled at all."

A combination of old parts is a good subject of a patent: *Harrison* v. *Anderston Foundry Company* (5), and the same principle applies to a trade-mark. The Respondent's mark combines his name and address with the device, and a name may be very valuable as a trade-mark: *Ainsworth* v. *Walmsley* (6).

[PEARSON, J.:—That case was decided before the *Trade-marks Registration Acts: In re Price's Patent Candle Company* (7).]

In two of the cases which have been relied on as shewing public user the combination does not contain all the elements used by *Wragg*, and in a third the device was not used as a trade-mark, it was only used in trade circulars and advertisements. As to the other two persons who have used the device, *Wragg* has acquired a good title against them by his registration for five years.

(1) 7 Ch. D. 724.
(2) 26 Ch. D. 288.
(3) 24 Ch. D. 504.
(4) 7 Ch. D. 725.
(5) 1 App. Cas. 574.
(6) Law Rep. 1 Eq. 518.
(7) 27 Ch. D. 681.

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I am asked to put this construction on the 76th section of the *Trade-marks Act* of 1883, that, whenever a trade-mark has been registered for five years, the registration is conclusive evidence of the title of the person on the register, and that it is impossible to go behind the register, or to say that the mark ought not to have been put on it. For that construction there is cited a *dictum* of *Jessel*, M.R., which is supposed to intimate that, after a trade-mark has been on the register for five years, an absolutely good indefeasible title is acquired to it. He does not, however, say that it is impossible to remove the mark from the register after it has been there for five years, and to my mind the mischief of such a construction would be so great that I should be very slow to adopt it. If that is the right construction of the section, as soon as the five years have passed, as soon as the clock has struck, the right to use the trade-mark is indefeasible. I must leave that construction to be put on this section by a higher authority. At the present moment, subject to correction by a higher tribunal, I think the Act ought to be read as intended for the protection of honest persons in the legitimate mode of carrying out their own operations, and I think I should be forgetting altogether the 74th section if I were to hesitate at all as to what I ought to do in the present case.

[After stating the facts his Lordship continued:—] To my mind, the syphon being the material part of the mark, whether you have all the three things, the hand, the syphon, and the glass, used, or only two of them, the syphon being one, is immaterial. I consider the combination of two of the three so like the combination of the three, that an honest trader would not take the combination of the two if he knew that his brother trader was entitled to the combination of the three. The distinction between them is exceedingly small, certainly much smaller than the distinction between the devices of a cock in *In re Walkden Aerated Waters Company* (1).

Now, this mark being used before 1875, how was it used? To my mind it was used in a manner which exactly corresponds with

(1) 1 Trade-marks Jour. 39.

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the language of the 74th section of the Act. Before 1875, I apprehend (and I should so decide), Mr. *Wragg* had no right to register the mark which he did register in 1876, because sub-sect. 3 of sect. 74 of the Act says this, "Any device . . . which was before the 13th day of August, 1875, publicly used by more than three persons on the same or a similar description of goods shall for the purposes of this section, be deemed common to the trade in such goods." Now what does "publicly used by more than three persons" mean? Mr. *Aston* says that I must find a user as a trade-mark, and that, inasmuch as none of the persons referred to could prove that they themselves had used the mark as an exclusive trade-mark, therefore, there had been no public user within the meaning of that section. But the section speaks of a public user by more than three persons on the same or a similar description of goods. It is quite plain that if more than three persons, if twenty persons, in the trade are all using the same device, it would be impossible to treat it as the exclusive trade-mark of any one of them. They are all using it, and, inasmuch as they are all using it, the section says it is to be treated as common to the trade in such goods, and, if it is common to the trade, then all persons in the trade have the right to use it, and it cannot be registered as the exclusive trade-mark of any one of them.

I come, therefore, to the conclusion that in the year 1876, when Mr. *Wragg* registered this device, it was a device which had been publicly used up to that time by more than three persons, and "had become common to the trade in such goods."

But it is said that, because Mr. *Wragg* has registered, he has got an exclusive right to it. To my mind he could get an exclusive right only to that which he was authorized to register under the Act, and it is quite plain that no person can with propriety go to the Comptroller and ask to register as his exclusive property a mark which is common to all persons engaged in the same trade.

I hold, therefore, that when Mr. *Wragg* registered this mark he registered that which he had no right whatever to register, and that he has acquired no title whatever by the lapse of time, and, inasmuch as the mark was not properly registered when it was

registered in 1876, it ought to come off the register now. It ought to come off for this reason, that, so long as it remains on the register, it apparently gives the person who has registered it an exclusive right to use it; it enables him, if he is minded to do that which is unjust and fraudulent, to terrify other persons by informing them that they have no right to use that which is common to the trade, because he has chosen improperly to register it as his own. I am of opinion that the five years' registration cannot by any possibility make good that which was invalid in its inception, and on that ground I order this mark to be taken off the register, with costs to be paid by the Respondent.

Solicitors for Applicant: *J. E. & H. Scott*, agents for *J. T. Thompson, Birkenhead.*

Solicitors for Respondent: *Robinson, Preston, & Stow*, agents for *Rowlands & Co., Birmingham.*

W. L. C.

In re WOMERSLEY. ETHERIDGE *v.* WOMERSLEY.

[1884. E. 112.]

Administration—Judgment Creditor—County Court—Injunction.

Previously to the administration order in a creditor's action another creditor had obtained judgment in a county court against the Defendant, a sole executrix. The Court refused to restrain the creditor from pursuing his remedy in the County Court against the executrix personally, but ordered payment to the creditor by the receiver of the estate, without prejudice to the question whether the executrix should be allowed the payment.

THIS was a creditor's action against a sole executrix to administer the estate of her husband, the testator in the action. He died in November, 1883. On the 17th of November, 1884, *J. Brighton*, a creditor of the testator, issued a summons in the *Beccles* County Court against the Defendant to recover £5, the balance of a debt due to him from the testator at the time of his death. The summons was heard on the 3rd of December, 1884. The Defendant did not appear, and judgment was given against

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her for the £5 and costs. The writ in this action was issued on the 24th of November, 1884, and judgment pronounced on the 13th of December, 1884, and a receiver appointed. *J. Brighton* took out a judgment summons in the County Court against the Defendant. That was heard on the 11th of February, 1885. The Defendant appeared by her solicitor, and the County Court Judge made an order for committing her to prison for fourteen days, directing the order to be suspended for a month. This was a motion on behalf of the Defendant, Mrs. *Womersley*, to restrain *James Brighton* from enforcing the order for committing her.

S. B. L. Druce, for the motion:—

The Court having under its control the administration of the estate out of which the judgment creditor has to be paid will interfere to protect the executrix from being harassed by proceedings elsewhere: *Redhead* v. *Welton* (1).

Farwell, for the creditor:—

The judgment is a personal judgment against the executrix, and this Court will not interfere to prevent the creditor enforcing that personal remedy: *Lee* v *Park* (2); *Protheroe* v. *Forman* (3); *In re Timms* (4); *Daniell's* Chancery Practice (5).

S. B. L. Druce, in reply.

PEARSON, J.:—

I think Mr. *Farwell's* statement of the law is correct, not the less so because I find the same in *Haly* v. *Barry* (6). It was a case in which a creditor recovered judgment against his debtor and issued a *fi. fa.* Shortly afterwards the debtor died. The creditor entered a suggestion on the record, entitling him to have execution against the executrix, and obtained a charging order *nisi* upon shares belonging to the debtor. After the order *nisi* had been obtained, but on the same day, a decree was made for administration of the debtor's estate. The order *nisi* not having

(1) 30 L. J. (Ch.) 577.
(2) 1 Keen, 714.
(3) 2 Swan. 227.
(4) 26 W. R. 692.
(5) 5th ed. p. 1473.
(6) Law Rep. 3 Ch. 452

been made absolute, the plaintiff in the administration suit applied for an injunction to restrain further proceedings by the judgment creditor, and Lord *Hatherley* says this (1): "The question is, whether a creditor of the testator, who has recovered judgment at law against the executrix, and obtained a charging order *nisi*, is to be stopped from proceeding, because before the order *nisi* has been made absolute he has been served with notice of a decree for administration of the testator's estate made after the obtaining that order." I do not read all that refers to the order *nisi*. Then he says: "The statute directs the Judge to make an order *nisi*. If sufficient cause is shewn against it, it falls, but if not, it remains in force, and in the meantime it is operative, taking the fund out of the control of the debtor, and the only remaining question is, whether any sufficient cause can be shewn against making it absolute. I do not think that a subsequent decree for administration is a sufficient cause, *Clarke* v. *Lord Ormonde* (2)," which is the case referred to in *Lee* v. *Park* (3), "goes no such length as that, and it seems to me that the cases where a judgment has been obtained against an executor and the Court has refused to interfere have much more analogy to the present."

What has happened in this case is this: since the judgment for £5 was obtained an administration order has been made, and I have appointed a receiver. The receiver is now in possession, and, assuming him to have sufficient assets, I think I may make an order for the receiver to pay the judgment debt and the costs of this application to the judgment creditor: but I shall do that without prejudice to any question in the administration of the estate as to whether or not the executrix is to be allowed what is so paid; and she must undertake to treat it as paid on her account.

Solicitors for executrix: *Cattarns, Jehu, & Hughes*, agents for *Worship & Rising, Great Yarmouth.*

Solicitors for creditor: *Green & Hartcup*, agents for *Hartcup & Sons, Bungay.*

(1) Law Rep. 3 Ch. 455. (2) Jac. 108.
(3) 1 Keen, 714.

D. P.

PEARSON, J.

1885

April 17.

In re OVEY.
BROADBENT *v.* BARROW.

[1881 O. 282.]

Will—Charitable Legacy—Lapse—Cy-près.

A legacy to an ophthalmic hospital which had ceased to exist at the date of the testator's will held to have lapsed and not to be administered *cy-près*.

THIS was the further consideration of an action for the administration of the estate of *Henry Ovey*, who died on the 19th of June, 1881, having made a will dated the 1st of June, 1881, by which he appointed the Defendants his executors. The Plaintiffs were six nephews of the testator entitled to a legacy of £21,000 bequeathed by the testator.

The testator bequeathed a legacy of £500 to the *Ophthalmic Hospital* (near *Hanover Square, London*), and bequeathed pecuniary legacies to the *Sussex County Hospital* at *Brighton*, the *Brighton Blind Asylum*, the *Brighton Provident Dispensary*, *Dr. Tindal Robertson's Blind Mission*, and to the *Brighton Charity Organisation Society*. He bequeathed £2000 to his father-in-law, the said Dr. *Tindal Robertson*, upon trust, as he in his uncontrolled discretion should think fit, to pay and distribute the same in such proportions amongst any charities or hospitals of a charitable nature, and especially those for children or starving poor during the winter. To *Elizabeth Anne Robertson*, the wife of *Tindal Robertson*, £500, to be used by her in her uncontrolled discretion for charitable objects, and also £2000 upon trust to apply the same for the benefit of the *Children's Hospital, Dyke Road*, in her discretion. The testator gave and devised his residue to the Defendants upon trust, in the first place, to pay two legacies, and as to the residue thereof, or such part or parts thereof as might lawfully be appropriated to the purpose, for such one or more or any hospital of a charitable nature, and in such proportions as they in their uncontrolled discretion should think fit, and he directed that the aforesaid money legacies for charitable purposes should

be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes and preferably to any other payment thereout.

There were five ophthalmic hospitals in *London* and no more, the nearest of which to *Hanover Square* was a mile off. The two nearest were the *Western Opthalmic Hospital, Marylebone Road,* and the *Royal Westminster Ophthalmic Hospital, King William Street, Charing Cross.* There was an orthopœdic hospital which had an entrance in *Hanover Square,* called the *Royal Orthopœdic Hospital.* There was evidence that the testator had visited that hospital. There was also in evidence an affidavit by the secretary of the *Royal London Ophthalmic Hospital, Moorfields,* that an institution called the *Royal Infirmary for Diseases of the Eye* had existed in *Cork Street,* near *Hanover Square*; that the infirmary had been closed and its affairs wound up in or about March, 1872, and the balance of its funds had been transferred to the hospital at *Moorfields.*

Cozens-Hardy, Q.C., and *R. F. Norton,* for the Plaintiffs:—

The gift to the *Ophthalmic Hospital* near *Hanover Square* fails, inasmuch as there is no institution that answers to that description. The intention of the testator was to benefit a particular institution. There is, therefore, no reason for administering the fund *cy-près*: *Clark* v. *Taylor* (1).

Hatfield Green, for the *Orthopœdic Hospital*:—

The institution the testator intended to benefit is the *Orthopœdic Hospital.* There has been some clerical error, and the Court will read the will as if Orthopœdic had been written instead of Ophthalmic: *Parsons* v. *Parsons* (2).

Vaughan Hawkins, for the Attorney-General:—

The testator may have meant the legacy for the institution that formerly existed in *Cork Street,* and in that view it may be right to give the legacy to the hospital in *Moorfields.* Perhaps the better view is that it cannot be determined what particular institution the testator meant to benefit. In any case, the general

(1) 1 Drew. 642. (2) 1 Ves. 266.

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intention of the testator to give the legacy for charitable purposes will be carried out *cy-près*; instead of directing a scheme for so small a sum the legacy might be divided between the *Westminster* and *Marylebone Hospitals*. Had the gift failed by reason of the coming to an end of an institution after the testator's death, when the money had been paid over, there can be no question that the money would have been administered *cy-près*, and there can be no difference in principle between that case and the present: *In re The Clergy Society* (1); *Bennett* v. *Hayter* (2); *Loscombe* v. *Wintringham* (3); *Wilson* v. *Squire* (4); *In re Maguire* (5); *Jarman* on Wills (6). The whole scope of the will shewed the desire of the testator to benefit charities, and charities for the blind in particular.

Cookson, Q.C., and *Borthwick*, for the Defendants:—

The object of this particular gift was to benefit the particular institution, that failing, there is no reason for giving the legacy to any other charity: *Fisk* v. *Attorney-General* (7). The mode in which the testator has dealt with his residue confirms this view.

Higgins, Q.C., and *Daniel Jones*, *Fischer*, Q.C., and *Stirling*, and *H. A. Giffard*, Q.C., and *Decimus Sturges*, for other parties.

Cozens-Hardy, in reply.

[*Attorney-General* v. *Bishop of Oxford* (8); *Cherry* v. *Mott* (9), and *New* v. *Bonaker* (10) were also referred to.]

PEARSON, J. (after enumerating the charitable legacies given by the testator, continued):—

I ask myself what was the intention of the testator in giving these legacies? Did he mean to give general legacies for general purposes, or did he mean to give particular legacies for the particular objects mentioned in this part of the will? I certainly come to the conclusion that his object, as far as regards the blind,

(1) 2 K. & J. 615.
(2) 2 Beav. 81.
(3) 13 Beav. 87.
(4) 1 Y. & C. Ch. 654.
(5) Law Rep. 9 Eq. 632
(6) 4th Ed. vol. i. pp. 243, 244.
(7) Law Rep. 4 Eq. 521.
(8) 1 Bro. C. C. 444, n.
(9) 1 My. & Cr. 123.
(10) Law Rep. 4 Eq. 655.

was not to give general legacies for the benefit of blind persons, but to give particular legacies for particular institutions established for the care, protection, or education of the blind, and that instead of picking out one general object, namely, blind persons, he meant to single out particular institutions which he thought worthy of encouragement. That, to my mind, is shewn by the manner in which he has given the legacies in the first instance to the "Hospital near *Hanover Square, London*"—one particular institution, next "to the Blind Asylum at *Brighton*," that is something different from a hospital and, next, to Dr. *Tindal Robertson's Blind Mission.* That is shewn still further, because, when he comes to have a general object he gives £2000 to be distributed amongst any charities or hospitals of a charitable nature; so, again, he gives £500 for any charitable objects which the donee of the power might choose to select. This is further shewn in the gift of the residue, which is "for such one or more or any hospital of a charitable nature." I think, therefore, I am right in saying that what the testator had in view here was not to give his money generally for the benefit of blind persons, but to give his charity in this particular manner for the furtherance of three particular institutions which he conceived had been established for the benefit of the blind in particular ways.

Having said so much upon the will, the question arises upon the gift to the *Ophthalmic Hospital*, near *Hanover Square, London*, and the facts before me are these. There is no hospital now that can fairly be called the "*Ophthalmic Hospital*, near *Hanover Square, London*," but there was a hospital in *Cork Street*, near *Hanover Square*, no doubt it had not the name of "*The Ophthalmic Hospital*," but it was, "*The Royal Infirmary for Diseases of the Eye*," which was situate in *Cork Street*, near *Hanover Square, London.* That hospital came to an end in the year 1872, nine years before the testator made his will; but there is no evidence whatever before me to shew whether the testator knew it had come to an end, or whether he had any information about it which would lead me to suppose that he did not intend that hospital. The only evidence before me being that there was in 1872 this hospital in *Cork Street*, and that there is no hospital now near *Hanover Square*, the reasonable conclusion in my mind is, that the testator had heard of this hospital in *Cork Street* at some time of his life,

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and that it was a good and excellent hospital, and, selecting particular objects with reference to the benefit of the blind, he selected the hospital in *Cork Street*, not knowing that it had come to an end.

Now the rule of law is laid down by Vice-Chancellor *Kindersley* in the case of *Clark* v. *Taylor*; he says (1): "Now there is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shews an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally: that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity." That decision was cited by Vice-Chancellor *Wood* in the case of *Fisk* v. *Attorney-General* (2), and the Vice-Chancellor there referred to an argument of the late Sir *John Wickens*, founded upon the same principle upon which Mr. *Vaughan Hawkins* argued to day, that though the charity failed so far as the particular institution goes, because there is no *Ophthalmic Hospital* in this case near *Hanover Square, London*, that, therefore, it ought to go according to the *cy-près* doctrine to other *Ophthalmic Hospitals* in *London*. Vice-Chancellor *Wood* says (3): "Then there is the other point which was argued by Mr. *Wickens*, as to the gift to the charity which no longer exists. I am far from saying that that argument may not some day or other require further consideration; but there are two decisions, one by Vice-Chancellor *Kindersley*, of *Clark* v. *Taylor* (4), the other by Vice-Chancellor *Stuart* of *Russell* v. *Kellett* (5), which expressly decide, that when a gift is made by will to a charity which has expired, it is as much a lapse as a gift to an individual who has expired. The contrary argument is, that the gift has been given to the charitable body expressly for the implied purpose of charity, the objects of which can be clearly ascertained. Then, if it is

(1) 1 Drew. 644.
(2) Law Rep. 4 Eq. 521.
(3) Law Rep. 4 Eq. 527.
(4) 1 Drew. 642.
(5) 3 Sm. & Giff. 264.

intended to benefit the objects, why, it is said, should they be defeated, merely through failure of the channel by which they are to take the benefit? But a great deal may be said about the prospect of a conflict between rival charities, and the risk of the Court giving to charity *A.* a fund which the testator intended to give to a rival charity *B.*, but which expired in his lifetime. Upon the whole, I think I ought not to interfere with the settled authorities." I must conclude from that, that Vice-Chancellor *Wood* agreed with what has been laid down as the rule by Vice-Chancellor *Kindersley*, and I have not been referred to any later authority which either overrules or throws any doubt upon these two decisions. Mr. *Vaughan Hawkins* has called my attention to the observations of a very learned writer, whom we all respect, in his book upon Wills, but I certainly cannot take any doubts expressed by Mr. *Jarman* as overruling the two decisions by Vice-Chancellor *Kindersley* and Vice-Chancellor *Wood*. Coming, therefore, as I do, to the conclusion that a particular object was intended, and that the gift to that object failed because that object had ceased to exist at the time when the testator made his will (and of course, therefore, at the time of his death), I must hold that that legacy lapses, that it is not applicable generally for charity under the rule of law to which Mr. *Vaughan Hawkins* has referred, but that as far as regards the particular legacy in the particular place in which it is found in the will, that legacy lapses. I have the less difficulty in this case in arriving at that conclusion, because when I look at the gift of the residue to which Mr. *Cookson* referred me, I find that the testator in the gift of the residue does not direct that the hospitals to be selected shall be hospitals for the blind, but hospitals generally, and I cannot therefore conclude that he had an intention of benefiting simply hospitals for the blind, but that he had the intention of benefiting a particular hospital if that particular hospital was in existence and capable of receiving his bounty. I must, therefore, decide that the legacy lapses.

Solicitors: *S. Copping; May & May; Hare & Co.; Lawford, Waterhouse, & Lawford; Young, Jones, Roberts, & Hale.*

D. P.

C. A.
1885
March 25.

GARNHAM *v.* SKIPPER.

[1883 G. 1675.]

Practice—Preliminary Accounts and Inquiries—Rules of Supreme Court, 1883, *Order* XXXIII., *r.* 2.

The Plaintiff, an equitable mortgagee, brought an action for foreclosure or sale against several other mortgagees, insisting that under the circumstances she was entitled to priority over the Defendants. The alleged priority of the Plaintiff to the Defendants depended on questions of notice and fraud. On the application of the Plaintiff, *Kay*, J., on summons under Order XXXIII., rule 2, made an order directing an inquiry what were the respective priorities of the incumbrances of the Plaintiff and the respective Defendants, and an account of what was due to the incumbrancers respectively. One of the Defendants appealed:—

Held, on appeal, that this order must be discharged, for that Order XXXIII., rule 2, was not intended to authorize the sending the whole of the questions in a cause to be tried in Chambers, but only to authorize the Court to direct, before trial, accounts and inquiries which would otherwise have been directed at the trial.

THE case alleged by the statement of claim of the Plaintiff, who was the executrix of *John Garnham*, was to the effect that, by indenture dated the 15th of April, 1868, reciting that *Skipper* had charged the hereditaments thereinafter referred to with the payment of £2400 and interest by deposit of title deeds, and a declaration of lien dated the 9th of January, 1867, to persons entitled under the settlement of *Jay* and wife, *Skipper* mortgaged to *Garnham* in fee for £500 a messuage in *London Street*, and a messuage upon *St. Andrews' Steps* in *Norwich*. That *Skipper*, who was a solicitor, represented to *Garnham*, who had no independent solicitor in the matter, that the equitable mortgage was subsisting, and that *Skipper* held the deeds as solicitor and trustee for the persons for whose benefit the equitable charge was made. That on the 8th of March, 1872, *Skipper* gave a further charge for £250 to *Garnham*, who advanced the money without notice of any prior incumbrance except the £2400. That *Garnham* died in November, 1872, leaving a will by which he appointed the Plaintiff and two others his executors, and bequeathed to the Plaintiff his residuary estate, which included the above mortgage debts, and devised all mort-

gage estates to his executors. That *Skipper*, on the 10th of May, 1878, gave the Plaintiff a further charge for £500 advanced by the Plaintiff, and in August, 1878, the Plaintiff advanced *Skipper* the further sum of £850, and *Skipper* by deed charged the property with that sum. That the Plaintiff advanced these sums without notice of any prior incumbrances except those appearing above. That the Plaintiff had recently (in 1883) received notice of mortgages to the Defendant *Maria Harrison* for £2000, to the Defendants *Gurneys & Co.* for the balance of a banking account, to the Defendant *Sarah C. Jay* for £1700, and to the Defendants *Keeble* and *Stibbons* for about £400. That by indenture dated the 20th of June, 1883, made between the Plaintiff and her co-executors of the one part, the Plaintiff of the second part, and *J. S. Clowes* of the third part, *Garnham's* two mortgage debts of £500 and £250 were assigned to the Plaintiff and the mortgaged property conveyed to her in fee. The Plaintiff claimed a declaration that she was entitled under the instruments of the 15th of April, 1868, 8th of March, 1872, 10th of May, 1878, and August, 1878, to a security on the property in priority to all claims of the Defendants, and, so far as necessary, to have the priorities of the parties ascertained, and to have foreclosure or sale.

Skipper by his defence stated that the above-mentioned £2400 was trust money held by him as the executor of the last surviving trustee of the settlement of *Jay* and wife, which sum he had invested along with money of his own in the purchase of the above property, and had executed a declaration of lien dated the 9th of January, 1867, for that sum, by which he undertook to execute to the persons beneficially interested under the *Jay* settlement or to their nominee a legal mortgage of the property for the £2400 and interest.

The mortgage of *Maria Harrison* was dated the 13th of March, 1876, and comprised only the *London Street* house. By her statement of defence she alleged that she advanced the £2000 without notice of any prior incumbrance, and obtained the title deeds. That *Garnham* had been guilty of negligence in not obtaining the deeds, and that the Plaintiff's securities ought to be postponed to her (Mrs. *Harrison's*) mortgage. She also alleged that *Skipper* had paid off the equitable mortgage with her money, and that she

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was therefore entitled to stand in the place of the equitable mortgagee. She raised several other objections to the title of the Plaintiff, and alleged that under the circumstances the Plaintiff could not tack her own advances, which were subsequent to Mrs. *Harrison's* mortgage, to the moneys advanced by *Garnham*. She alleged that the legal estate was not vested in the Plaintiff.

The mortgage of *Sarah C. Jay* was alleged in her statement of defence to be dated the 20th of October, 1880. She alleged that the £1700 for which it was given was part of the £2400 for which *Skipper* had given a charge in favour of the persons interested under the *Jay* settlement. She stated that she had become entitled to a moiety of the *Jay* trust funds, and that the £1700, part of the £2400, was allotted as part of her share, that she thereupon became entitled to the extent of £1700 to the benefit of the indenture executed by *Skipper* in 1867, and that the mortgage was given in order to give effect to her right. She claimed to be first mortgagee for £1700.

Gurneys & Co. stated by their defence that their mortgage was dated the 14th of February, 1878, and included both properties, and was made to secure £1296 and interest and further advances "subject to prior mortgage incumbrances for £3500." How this last sum was made out did not appear.

The Plaintiff took out a summons asking that the following accounts and inquiries might be taken and made: (1.) What are the respective priorities of the incumbrances of the Plaintiff and the respective Defendants in the pleadings mentioned? (2.) An account of what is due to each of the respective incumbrancers upon their respective incumbrances.

Maria Harrison thereupon took out a summons asking that this action, or the issues of fraud and negligence arising therein, might be tried by a special jury.

The summonses were adjourned into Court, and on the 7th of February, 1885, Mr. Justice *Kay* made an order as asked by the Plaintiff's summons. *Maria Harrison* appealed, and the appeal was heard on the 25th of March.

Warmington, Q.C., and *Willis Bund*, for the appeal:—

Our objection is that this is not within the scope of Order XXXIII.,

rule 2. The case is not an ordinary case of dispute as to priorities, it is one that requires the examination and cross-examination of witnesses. If this order is upheld, every contested action may be sent to be tried in Chambers upon inquiries.

Hastings, Q.C., and *W. P. Beale*, for the Plaintiff:—

It is almost impossible to try such a case as this in Court, and the ordinary practice is to ascertain the relative priorities of incumbrancers by inquiry in Chambers.

[FRY, L.J.:—Not where the priority depends on questions of notice or fraud.]

[COTTON, L.J.:—There is a difficulty in interfering with the discretion of the Judge as to the way in which a cause should be tried, but we must consider the rights of the parties.]

The Court under the rules has power to determine what parts of the case shall be taken in Chambers.

[COTTON, L.J.:—Has the main issue in a cause ever been sent to be tried in Chambers?]

We cannot get full relief at the trial, viz., the distribution of the estate, unless this inquiry has first been answered.

Hadley, for *S. C. Jay*.

John Cutler, for *Gurneys & Co.*

Ingpen, for Defendants *W. Skipper*, *William Francis Keeble*, *and James Stibbons*.

COTTON, L.J.:—

If this had been a case where the Judge had exercised his discretion under an order which gave him a discretion, we should not have interfered. But the question is whether this case is within Order XXXIII., rule 2, and in our opinion it is not. That rule is, "The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should

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proceed in the ordinary manner." In this case the Plaintiff comes alleging that under the circumstances she is entitled to be treated as first mortgagee. The Defendants for various reasons resist this claim. It would be wrong to send the whole matter to be decided in Chambers under the above order. The doing so is a referring to Chambers of the whole of the matters to be decided at the trial. The expression "necessary inquiries and accounts" shews that it was not intended to authorize the sending of the whole case to Chambers, but only the directing such accounts and inquiries as are subsidiary to determining the rights of the parties. It is said that the questions here to be tried are the sale of the estate and the distribution of the proceeds. Those are not the questions to be tried, but the consequences of the decision at the trial. I am of opinion that the order cannot be supported.

BOWEN, L.J.:—

I am of the same opinion. The effect of this order would be that there would be no real trial of the questions arising in the action.

FRY, L.J.:—

I concur. When questions are raised which ought to be decided at the trial they are not proper to be sent to Chambers. What the order intended was to authorize inquiries, which would otherwise have been directed at the trial, to be directed before the trial.

Solicitors for Plaintiff: *Bell, Brodrick, & Gray.*
Solicitors for *Skipper*: *Owles & Collinson.*
Solicitors for Appellant: *Crowdy, Son, & Tarry.*
Solicitors for *S. Jay*: *Blake & Heseltine.*
Solicitors for *Gurneys & Co.*: *Johnson & Master.*

H. C. J.

In re BOYCOTT.

C. A. 1885 March 25, 31.

Solicitor—Bill of Costs—Taxation after Payment—"Special Circumstances"—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 41 [*Revised Ed. Statutes, vol. ix., p.* 132].

Mortgagees for £2000 were proceeding to sell the mortgaged estates. On the 1st of September, *S.*, the mortgagor's solicitor, wrote to *B.*, the mortgagee's solicitor, informing him that he had found a transferee, and proposing to complete the transfer on the 3rd. *B.* wrote back proposing the 10th for completion, and afterwards postponed the appointment to the 13th. His bill of costs, which amounted with surveyor's charges to more than £450, was received by *S.* on the 9th. On that day *S.* wrote to *B.*, saying that the bill of costs appeared excessive, and would require to be carefully gone into, but did not propose to postpone the completion. On the 12th *S.* took with him a written protest against the bill, and had two interviews with *B.*, at which arrangements were made for completion. *S.* did not mention the subject of costs at either interview, but deposed that he had intended to do so at a third appointment on the same day, which *B.* did not keep. On the 13th the parties met, the transfer was completed, and the bill of costs paid, *B.* refusing to part with the deeds unless it was paid. *S.* delivered his written protest, and it appeared that *B.* expressed willingness to reconsider his bill if any item were shewn to be erroneous, but said nothing to the effect that it was to be treated as open to taxation. The mortgagor applied for taxation, alleging pressure and overcharge, but not referring to any specific items of overcharge. *Bacon*, V.C., made an order for taxation, and *B.* appealed:—

Held, by *Cotton* and *Fry*, L.JJ. (*dissentiente Bowen*, L.J.), that the order for taxation must be discharged, for that as the shortness of the interval between the delivery of the bill and the time fixed for completion did not arise from any act of the mortgagee's solicitor, but was owing only to the desire of the mortgagor for speedy completion, there was no pressure such as to justify taxation, though the case would have been otherwise if the mortgagee had been pressing for an early settlement:

Held, by *Bowen*, L.J., that the *Solicitors Act*, 1843, sect. 41, authorizes taxation after payment where there are special circumstances which, in the opinion of the Judge, require the same; that there is no inflexible rule that the special circumstances must be pressure with overcharge, or overcharge so gross as to amount to fraud; and that in the present case, as the parties did not at completion treat the bill as finally settled, and *B.* had taken advantage of the inconvenience which a postponement of the settlement would have occasioned to the mortgagor, there were special circumstances justifying taxation:

Held, by *Bowen*, L.J., that where a bill is so large as to be redolent of

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overcharge it is not necessary that specific items of overcharge should be pointed out:

Held, by *Fry*, L.J., that though the bill appeared excessive, the Court could not treat overcharge as shewn, unless specific items were pointed out on which it could exercise its judgment.

IN 1879 *Colonel Wemyss* borrowed from *Nott* and *Edwards* £2000 on mortgage of his reversionary interest in certain properties in *Wales*. The mortgage was for a term of ten years, provided interest was punctually paid.

On the 10th of October, 1883, a half-year's interest due on the 20th of July being unpaid, the mortgagees gave the mortgagor notice to pay off the debt. Mr. *Boycott* was solicitor to the mortgagees. The mortgage debt not having been paid, the mortgagees, on the 27th of August, 1884, instructed an auctioneer to sell the property, and the sale was fixed for the 17th of October. The mortgagor's solicitor found a client who was willing to take a transfer of the security, and on the 1st of September wrote to Mr. *Boycott* informing him of that fact, and asking him to send an account of principal, interest, and costs, and inquiring whether his clients could attend on the 3rd to receive the amount. Mr. *Boycott* in reply telegraphed that he could not have his bill of costs ready by that day, and proposed to fix the 10th, but on the 5th wrote to postpone the appointment till the 13th. On the 8th of September, Mr. *Boycott* sent off his bill of costs, which amounted to £327 19*s.* 8*d.*, besides £131 17*s.* surveyor's charges, and was received on the 9th. The mortgagor's solicitors wrote on that day to Mr. *Boycott*: "We propose to come over to *Hereford* some time on Friday and call upon you, and go into the matter and get the transfer engrossed and ready for execution. We can then go on with you to *Knighton* the following day and complete it. Your account seems to us to be very excessive, and we shall have to go into the same carefully."

On Friday the 12th of September, Mr. *Smith*, one of the mortgagor's solicitors, called at Mr. *Boycott's* office in *Hereford* about 10 o'clock and saw Mr. *Boycott*. Mr. *Boycott* had to go to the County Court, and during his absence Mr. *Smith* inspected the deeds and prepared the draft transfers. When Mr. *Boycott* came in, Mr. *Smith* went through the transfer with him, and it was

approved. It was arranged that the transfer should be engrossed on the mortgage deed ready for execution on the following day. Mr. *Smith* arranged to call again on Mr. *Boycott* about 12 o'clock, and did so, but did not find him in, and being obliged to leave *Hereford* at 1 o'clock did not see him again on that day. Mr. *Smith* said nothing to Mr. *Boycott* on the 12th about the bill of costs, but deposed that he had intended to do so at the proposed interview which did not take place, and that he had abstained from doing so at the interviews on that day, because, having no legal right to inspect the deeds, he did not wish to have any unpleasantness with Mr. *Boycott* till the transfer had been settled.

On the 13th, Mr. *Smith* met Mr. *Boycott* at *Knighton* at the time appointed for completion of the transfer, and objected to the amount of his costs and the surveyor's charges. Mr. *Boycott*, however, declined to part with the deeds unless those costs and charges were paid in full, which was accordingly done, Mr. *Smith* at the same time handing to Mr. *Boycott* a formal notice, which he had prepared on the 11th and brought with him on the 12th, that these costs and charges were objected to and paid under protest. Mr. *Boycott*, in the receipt which he gave for them, admitted that they were paid under protest. Some further communications as to the bill of costs passed at this interview, and Mr. *Boycott* expressed his readiness to explain any items which required explanation, but did not say anything from which it could be inferred that he intended his bill to remain subject to taxation, though it might possibly be inferred that he did not consider the amount finally settled, but would make an abatement if any of the items were shewn to be incorrect.

The explanation given of these heavy charges was, that as the title deeds contained only old and vague descriptions of the property, it was necessary for Mr. *Boycott* and the surveyor to go over the ground together, in order that the plans and particulars of sale might be made out satisfactorily.

On the 30th of October, 1884, the mortgagor took out a summons to tax the bill of £327 19*s.* 8*d.*, and Vice-Chancellor *Bacon*, being of opinion that there was pressure and overcharge, made an order referring the bill for taxation. *Boycott* appealed and the case was argued on the 25th March.

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Swinfen Eady, for the Appellant:—

Under the *Solicitors Act*, 6 & 7 Vict. c. 73, s. 41, taxation after payment can only be ordered under special circumstances, and it has been held in a series of cases that the requisite special circumstances are pressure and overcharge, or overcharge so gross as to amount to fraud. If there ever was any pressure at all in this case it ceased on the 2nd of September. On the 8th *Boycott* sent his bill, which was received next day. No protest was made against the bill on the 12th, when *Boycott* and *Smith* met, and on the 13th the bill was paid under protest. The other side say there was pressure because they were anxious to have the transfer executed and to complete their arrangements with the transferee, but it is not shewn that there was any such necessity for completion as to make pressure. No sale was then threatened, and the mortgagor had time to consider the bill. *In re Lacey & Son* (1) shews that under such circumstances there is no pressure. If gross overcharge is relied on, specific items of overcharge ought to be alleged: *In re Browne* (2); and even where pressure and overcharge are relied on, the cases shew that specific items of overcharge must be alleged. But here there is nothing beyond a vague statement that the charges are excessive, a statement which it is impossible to meet. Protest is of no avail: *In re Harrison* (3); *In re Neate* (4). The practice is laid down in *In re Barrow* (5) in the same way as in *In re Lacey & Son.*

Bosanquet, Q.C., and *Acland*, *contrà*:—

In none of the cases where taxation has been refused had there been so short a time between the delivery of the bill of costs and the payment as in the present case. In *In re Rance* (6) taxation was ordered under circumstances very like the present.

[FRY, L.J.:—There the solicitor was pressing for completion.]

The correspondence shews that *Boycott* was informed of the nature of the objections to his bill. According to *In re Newman* (7) there is no rigid rule defining what are the special

(1) 25 Ch. D. 301.
(2) 1 D. M. & G. 322.
(3) 10 Beav. 57.
(4) 10 Beav. 181.
(5) 17 Ibid. 547.
(6) 22 Ibid. 177.
(7) Law Rep. 2 Ch. 707.

circumstances which will induce the Court to order taxation, and we submit that in the present case the circumstances were such that taxation was rightly ordered.

Swinfen Eady, in reply:—

Mr. *Smith* evidently had an intention to tax which he concealed; he wished to get the benefit of payment and tax afterwards.

[BOWEN, L.J.—*In re Harrison* (1) was disapproved of by the Court of Exchequer in *In re Dearden* (2), and in *In re Newman* (3), *Rolt*, L.J., appears to have considered that there was no hard and fast rule.]

It may be that no case lays down expressly that pressure and overcharge or gross overcharge will do, and that nothing else will do, but the cases shew that neither pressure alone nor mere overcharge alone will do: *Re Pugh* (4).

[BOWEN, L.J., referred to *Ex parte Barton* (5).]

In the present case there was no pressure, and overcharge is not proved.

1885. Mar. 31. COTTON, L.J.:—

This is an appeal from an order of Vice-Chancellor *Bacon* directing taxation of the bill of costs of the Appellant, *William Boycott*. It was a bill of costs on behalf of mortgagees, and the application is made on behalf of the mortgagor. The bill had been paid, and that being so, the question was whether the Vice-Chancellor was justified in ordering taxation.

After payment taxation is not a matter of course. The statute 6 & 7 Vict. c. 73, s. 41, provides: "That the payment of any such bill as aforesaid shall in no case preclude the Court or Judge . . . from referring such bill for taxation if the special circumstances of the case shall in the opinion of such Court or Judge appear to require the same, upon such terms and conditions and subject to such directions as to such Court or Judge shall seem right, provided the application for such reference be made within twelve

(1) 10 Beav. 57.
(2) 9 Ex. 210; 17 Jur. 993.
(3) Law Rep. 2 Ch. 707.
(4) 32 Beav. 173.
(5) 4 D. M. & G. 108.

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calendar months after payment." After that time there is no power to tax.

In my opinion, where there is a discretion in the Judge, we ought not to interfere unless we see that he is clearly wrong. If the matter had come before me originally, and in the absence of the long course of decisions on the subject, I should probably have said that it would be best not to attempt to define in any way what special circumstances would justify a Judge in referring a bill for taxation after payment, but there is a long course of decisions, beginning with one by Lord *Langdale*, which have laid down that in order to justify the taxation of a bill after payment there must be pressure and overcharge, or overcharge amounting to fraud.

What pressure is has not been determined. Whether there is pressure must be decided on the circumstances of each particular case. In my opinion, unless there is overcharge amounting to fraud, there must be something in the nature of pressure, and, having regard to the decisions, I do not think that a Judge is at liberty to go at large into special circumstances merely because he thinks that justice would be done by ordering a taxation. Vice-Chancellor *Bacon* did not, as I understand, in any way intend to depart from the rule which I consider to have been laid down by a series of decisions, for he said he was clearly of opinion that there was pressure, and thought there was great overcharge.

The rule that, if the overcharges were not so great as to amount to fraud, there must be pressure, was acted upon in *In re Lacey & Son* (1). The Court there thought that the bill contained serious overcharges, and we gave our opinion as to those overcharges that there might be a rule for future cases, but we considered that there was no pressure, and that as the overcharges were not so gross as to amount to fraud, there was no sufficient reason for taxation. I gave the first judgment, in which I laid down the rule in those terms, and though Lord Justice *Fry* said that in the absence of pressure there were no special circumstances in that case, I do not think that either he or Lord Justice *Lindley* doubted that the decisions laid down the rule I have mentioned. Now, when a rule has been laid down and acted upon for years, the Court

(1) 25 Ch. D. 301.

of Appeal ought not lightly to depart from it and treat the matter as if there were no course of decisions.

What we have to consider is whether there was pressure, and I have reluctantly come to the conclusion that the facts here do not amount to pressure. I will not attempt to define positively what is meant by pressure, but I should say that where a solicitor who has given no opportunity of investigating his bill, takes advantage of its being important to the person chargeable that the transaction should be completed, and refuses to complete unless payment is made, that is pressure, but that there is no pressure where the necessity of paying the bill without investigation does not arise from any act or default of the solicitor. If the party liable to pay, chooses for his own purposes to limit so short a time for completion that the bill cannot be investigated before payment, he must take the consequences. If the 13th of September, the day of completion, which was only four days after the bill was received, had been fixed at the instance of Mr. *Boycott*, I should have thought that the case amounted to pressure. But how do the facts stand? For some reason not explained, Mr. *Smith*, the mortgagor's solicitor, was very anxious to get a speedy settlement. It is not alleged, and I have looked carefully through the evidence, that Mr. *Boycott* ever said that if the money was not paid by a certain time he would go on and sell. On the 1st of September Mr. *Smith*, having obtained some one to advance the money, wrote to Mr. *Boycott* asking for the matter to be completed on the 3rd. Up to that time he had not seen the bill of costs. Mr. *Boycott* sent a telegram, and also wrote, proposing the 10th, but afterwards postponed the appointment to the 13th. Mr. *Smith* got the bill of costs on the 9th, and at once considered that it was excessive and required investigation, and on the same 9th of September he wrote to Mr. *Boycott* saying that the bill appeared to him excessive, and would require to be gone into carefully, but he did not in any way seek to postpone the settlement on the 13th, that he might do what at a later date he says he was desirous of doing, send the bill to his *London* agents to see if it should be taxed. Having the bill of costs and seeing objections to it, he does not ask to postpone the settlement. On the 12th he goes with a notice which he had prepared protesting against the bill and sees Mr. *Boycott*. During

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his two interviews with Mr. *Boycott* he says not a word about the bill, but says that he intended to do so at a third interview, an appointment for which had been made. Mr. *Boycott* did not keep that appointment, and on that day nothing therefore was said by Mr. *Smith* about the bill.

On the 13th the matter was settled. I do not go into the details of what then took place, I will only observe that Mr. *Smith* did not even then say that the bill must be taxed, though something passed about the items. I think from the subsequent letters which passed that Mr. *Boycott* was willing, even after payment, to go into the question with Mr. *Smith* whether the items ought to be reduced. In that sense he may be may be said not to have treated the matter as finally settled, but I do not think that he can be considered to have agreed to submit to taxation. Mr. *Smith* hands in a formal protest, and obtains a receipt which admits that the amount was paid under protest, but that amounts to nothing. In my opinion it would have been pressure if Mr. *Boycott* had pressed for an early day, but Mr. *Smith* himself was desirous of having an early day. Even as it was, there was time for him to consult his *London* agents as to the bill. Under these circumstances, in my opinion, there is nothing which would justify us in sending this bill to be taxed, though I am inclined to think that the bill is of a startling amount, the costs being more than £450 with reference to an estate mortgaged for £2000. Having regard, however, to the long course of decisions, though most of them are the decisions of Courts of first instance, I do not think that this bill can be held liable to be referred for taxation. The order of the Vice-Chancellor must therefore be discharged.

BOWEN, L.J.:—

I am very sorry to say that I must differ from the judgment of Lord Justice *Cotton*. His authority and experience make me pause before differing from him; but the more I read the papers the more I think that this bill ought to be taxed. The Vice-Chancellor thought so, and I do not feel justified in overruling his judgment, which I think is right, and I am bound to express my views.

The application is made under the 41st section of the statute.

I think that under that section the Judge has a discretion, though not an absolute discretion. Payment of the bill—says the statute—shall in no case preclude the Judge from referring such bill for taxation if the special circumstances of the case shall in the opinion of the Judge require the same. It seems to me that to justify taxation there must be special circumstances which distinguish the payment in the particular case from an ordinary payment, therefore a bill cannot be referred to taxation after payment on the ground that justice would be better done in every case by sending a bill for taxation, but there must be special circumstances, and if there are special circumstances, the Judge has by the statute a certain discretion. Now Judges who sit in Courts of first instance find it no doubt very convenient to let the public know the lines upon which they mean to exercise their discretion, and I think it very well that they should do so, and they have in many cases proceeded on the principle that pressure and overcharge combined constitute the special circumstances mentioned in the Act. The rule, though not exhaustive, is probably a good working rule, sufficient for most cases; but if you press that rule too far and lay down as a definition that special circumstances are not to be considered to exist unless there be pressure and overcharge, it seems to me you are making an Act of Parliament. If the Legislature had meant that only these things should constitute special circumstances it could have said so. Special circumstances, I think, are those which appear to the Judge so special and exceptional as to justify taxation. I think no Court has a right to limit the discretion of another Court, though it may lay down principles which are useful as a guide in the exercise of its own discretion. It seems to me to be the true view of the statute that there must be special circumstances making the payment differ from an ordinary payment, and that the Judge thereupon has a discretion as to whether they are sufficient to authorize taxation.

Now the effect of an ordinary payment is to waive inquiry. But if the circumstances shew that the party neither waived inquiry nor intended to do so, but, owing to the inconvenience to which he would be put by postponing the completion, gave way and paid, there are special circumstances which differentiate the

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case from the ordinary case of payment. Without impugning the rule that in most cases pressure must co-exist with overcharge to justify taxation after payment, I insist upon this, that according to the terms of the Act the Judge has a discretion, and that if he comes to the conclusion that the circumstances are so special as to justify taxation we ought not lightly to overrule his exercise of that discretion. In the Court of Chancery there is a long *catena* of cases, principally at the Rolls, commencing with *In re Harrison* (1), which was cited before us to shew that a bill ought not to be referred to taxation unless there is both pressure and overcharge. *In re Harrison* was afterwards considered by the Court of Exchequer in 1853 in *In re Dearden* (2), before Chief Baron *Pollock*, Baron *Martin*, and others, and it was laid down that although discretion might properly be exercised according to known rules, nevertheless the object of the statute in giving a discretion to the Judge was that he might not be so fettered as to prevent justice being done in a new case. The subject came again in 1867 before Lord *Romilly* and the Court of Appeal in *In re Newman* (3) and *In re Harrison* was disapproved of. Lord Justice *Rolt* says (4): "The statute does not point out the special circumstances which shall in any case authorize the Court to direct taxation after payment; it is left to the Court to determine what special circumstances are sufficient for the purpose. I do not think that any of the decisions have laid down, and it is scarcely possible to lay down, a general rule on the subject." These remarks of the Lord Justice *Rolt* well express the view I take of the subject. It appears to me, therefore, that in 1867 the Court of Appeal thought that there was no hard and fast rule as to what constituted special circumstances. In *In re Lacey & Son* (5) this Court reversed the decision of the Court below, but in that case the decision in fact went upon this, that there were no special circumstances sufficient to distinguish the case from an ordinary case of payment. The expressions used by the different Judges in that case were not identical, and do not appear to me to be conclusive on the point. Lord Justice *Cotton* said that special circumstances must be pres-

(1) 10 Beav. 57.
(2) 9 Ex. 210; 17 Jur. 993.
(3) Law Rep. 2 Ch. 707.
(4) Ibid. 712.
(5) 25 Ch. D. 301.

sure and manifest overcharge, or overcharge so gross as to amount to fraud. Lord Justice *Lindley* says he does not attempt to define what are sufficient special circumstances to authorize taxation; and the language of Lord Justice *Fry* appears to me to leave it still open for me to take the view I do in this case, which is, that excellent as the rule is as a general rule, still, if the Judge finds a payment under peculiar circumstances, he is not bound to confine himself to the question whether there is pressure with overcharge.

Now consider the circumstances of this case. A mortgage for £2000 was about to be paid off. When Mr. *Smith*, the mortgagor's solicitor, on the 1st of September asked for the bill, could he suppose that the mortgagees' solicitor would send in one amounting to £327 19*s.* 8*d.* and surveyor's charges £131 17*s.*, being something between 20 and 25 per cent. on the amount of the loan? This was in the vacation, when it is very difficult to get bills taxed at all, and impossible to get them taxed in great haste. Mr. *Smith* was a country solicitor, and, as it was vacation, he had not the ordinary opportunity of consulting his *London* agents. He suggested at the first instance, on the 9th of September, that the bill was excessive, but did not put off the completion, which had been fixed for the 13th. Was he bound to put off the appointment until he had settled the matter as to costs? It seems to me that he was not bound to assume that the matter could not be amicably arranged, or that recourse must necessarily be had to taxation. On the 13th he never abandoned his objections to the bill, he paid it under protest and handed in a paper stating that he paid under protest. He asked Mr. *Boycott* to go through the bill, and arrange the matter with him, and, as I read the evidence, he left Mr. *Boycott's* office under the impression, clearly entertained by both parties, that the bill was not conclusively settled. It is true there was no reference to taxation, but he was not bound to refer to it. Both sides thought the bill was to be discussed, and the letters which passed in September seem to me conclusively to shew this.

Under these circumstances, I think it cannot be said that Mr. *Boycott* did not take the advantage of the inconvenience which would be caused to the mortgagor by having to postpone the

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settlement on the 13th. The deeds were refused unless payment was made. The only alternative Mr. *Smith* had, would be to throw over the appointment. I think this sufficient to distinguish this from cases of ordinary payment.

As to the overcharges, it is said that special items of overcharge must be shewn before taxation can be ordered. This is a good general rule from which I should be loth to depart, but if I find a bill which is redolent of overcharge, I do not think that I ought to require proof of particular items of overcharge.

In my opinion, therefore, the Vice-Chancellor was in this case right in referring the bill for taxation.

FRY, L.J.:—

That misconduct or fraud on the part of solicitors, or pressure accompanied by overcharge or overcharges so gross as to amount to fraud, are special circumstances within the Act has been firmly established. I do not desire to preclude myself from saying that there may be other special circumstances which would justify taxation. That question seems to me to be one which it is not necessary for us to determine in the present case, since no reason for taxation was urged, except that there had been pressure accompanied with overcharge. The judgment of the Court below is based, as I understand, upon that view, and I am unable to find any circumstances in this case to justify taxation unless it can be directed on the ground of pressure and overcharge. I think, therefore, that the present question must be determined upon inquiry whether there has been pressure and overcharge. Pressure alone is not enough, for this obvious reason, that a man cannot complain of pressure, unless he can shew that pressure was put upon him to pay more than he ought to have paid. The conclusion I arrive at is that expressed by Lord Justice *Cotton*. I think that no pressure was put upon Mr. *Smith* to pay Mr. *Boycott's* bill. Mr. *Boycott* was the solicitor of the mortgagees, who were about to sell the property. Mr. *Smith's* firm had found a person to take a transfer of the mortgage, and gave notice to *Boycott*. *Boycott* then stops further proceedings for the sale, and in pursuance of a request furnishes his bill on the 9th of September. Lord Justice *Cotton* has pointed out that the appointment for

completion originally came from Mr. *Smith*, and that two postponements were made by Mr. *Boycott* to the 10th and 13th. I am unable to find any threat from Mr. *Boycott* that unless the completion took place the sale would proceed. Then it is suggested that Mr. *Smith* was apprehensive that Mr. *Boycott* would incur further costs about the sale, unless the transfer was completed. The bill negatives that suggestion, and shews that no further costs were incurred about the sale after notice had been been given of the proposed transfer. It also seems to me that Mr. *Smith* might have done what he states he desired to do, consult his *London* agents. He received the bill on the 9th. His letter of the 9th shews that he had considered it, and had concluded that it was excessive. I think between the 9th and the 13th he might well have obtained the opinion of his *London* agents upon the character of the bill, and what sum he ought to tender on completion. He did not do so, and he seems to have been desirous to get the benefit of payment by preventing the mortgagees from selling, and at the same time to raise such a case that he could tax. That seems to me the only reason for his preparing on the 11th of September the document which was served upon Mr. *Boycott* at *Knighton* on the 13th, and, moreover, on the 12th he never indicated his objection to the bill. I think that there was no such pressure put by Mr. *Boycott* upon Mr. *Smith* or his clients as would justify taxation.

It remains to inquire as to the overcharge. The course pursued is unusual. Mr. *Smith* does not point out any particulars of overcharge. Now it appears to me very important in a controversy of this nature that we should be directed to some particular items of alleged overcharge upon which the Court can form a judgment. It is said that the bill is so redolent of overcharge that the Court must come to the conclusion that there are overcharges. I do not hesitate to say that the bill is one I should have been very glad to have submitted for taxation, but if asked to say that there is any item which must be disallowed on taxation, I cannot on the materials before me point out any such item. The circumstances are peculiar. The property is subject to heavy charges, and is situate in several counties in *Wales*. There had been no description of the property for sixty-

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five years. The mortgagees, if they sold, were bound to do their duty, and sell for the highest price, and I cannot say that the visits to identify the property were unnecessary.

Willing as I am for the bill to be taxed, I feel obliged to come to the conclusion that there has been neither pressure, nor proof of overcharge, nor other special circumstance to authorize the Court to send it for taxation. I think, therefore, that the appeal must be allowed.

Solicitor for Appellant: *Arthur Cheese.*
Solicitor for Respondent: *Griffith Jones.*

H. C. J.

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WALCOTT *v.* LYONS.

[1884 W. 3498.]

Practice—Adding co-Plaintiff—Rules of Supreme Court, 1883, *Order* XVI., *r.* 11.

The tenant for life of a trust fund brought an action against the trustees to make them liable for an improper investment. The trustees by their defence alleged that they had made the investment in question at the request of the Plaintiff. The Plaintiff thereupon applied for leave to amend by adding as co-Plaintiff his son, who had a reversionary interest in the fund, and *Bacon*, V.-C., made an order giving him leave:—

Held, on appeal, that the order must be discharged, for that Order XVI., rule 11, does not authorize the allowing a Plaintiff who has no right to sue, to amend by joining as co-Plaintiff a person who has such right.

THE Plaintiff in this case was tenant for life of one fourth share of the residuary estate of a testatrix, which fourth share, after the Plaintiff's death, was given to such of his children as should survive him. The action was brought against the trustees of the will to make them answerable for £3800 advanced by them in March, 1873, on an insufficient mortgage security. The Defendants by their statement of defence alleged, *inter alia*, that the Plaintiff had joined with another person beneficially interested in requesting them to make this investment, after receiving full information as to the nature and value of the security. The Plaintiff thereupon applied by summons for leave to add one of his sons as a co-Plaintiff. Vice-Chancellor *Bacon*, in chambers, made an order allowing the Plaintiff to amend the writ and

statement of claim by adding the son as a co-Plaintiff and certified that he did not require any further argument. The trustees appealed.

Marten, Q.C., and *Rawlinson*, for the appeal:—

The question is whether such an amendment as this comes within Order XVI., r. 11, and we submit that it does not. *Clowes* v. *Hilliard* (1), under the former rules, furnishes an analogy. It was not intended by the rule to enable a person who had no right to maintain a suit, to bolster it up by introducing a fresh plaintiff who had a right; to do so, would not be completing an existing action, which was the object of the rule, but substituting in effect a new one: *Dalton* v. *Guardians of St. Mary Abbotts, Kensington* (2).

Chester, contrà:—

I contend that the order was properly made under Order XVI., r. 11.

[FRY, L.J.:—Do you say that the proposed new Plaintiff ought to have been a co-Plaintiff, or that his presence is necessary to enable the Court to adjudicate upon all the questions in the cause?]

That his presence may be necessary. The cause involves two questions, breach of trust and acquiescence in it. The main question is whether there has been a breach of trust, and the Court will facilitate the trial of it by utilizing the existing proceedings, and not put the children to the expense of a new action in the event of acquiescence by the father being made out. The presence of the son may be necessary to enable the Court to decide the question of breach of trust. The case of *Dalton* v. *Guardians of St. Mary Abbotts, Kensington*, was quite different from the present, for there the claim of the proposed new plaintiff was in respect of a different property.

THE COURT asked *Chester* whether he would prefer to pay all the costs up to this time and retain the order, or to have the order discharged. He declined to elect.

(1) 4 Ch. D. 413. (2) 47 L. T. (N.S.) 349.

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COTTON, L.J.:—

This is an appeal from an order of Vice-Chancellor *Bacon* giving the Plaintiff leave to amend by adding a co-Plaintiff. We do not know the reasons of the Vice-Chancellor, but it is said that the order was made under Order XVI., r. 11, which provides that the Court or a Judge may at any stage of the proceedings order "that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." It is contended that the case comes within the latter words, for that the presence of the son may be necessary in order to enable the Court to adjudicate on the alleged breach of trust, which is one of the questions in the cause.

The facts are these:—The Plaintiff is tenant for life of a trust fund, the son has a contingent interest in the capital subject to the life interest. The suit is brought to impeach a certain investment as being a breach of trust. The defence alleges that the investment was made at the request of the father. The father then applied for leave to join the son as a co-Plaintiff, because it may turn out that the father has no right to sue. Can it be said under these circumstances that the presence of the son is necessary to enable the Court to adjudicate upon all the questions involved in the cause? I am of opinion that it cannot. The object of the amendment is, that if it is shewn that the father has no right to sue there may be a plaintiff who has such a right. It is contended that the main question in the cause is whether there has been a breach of trust. That is not so. The question in the cause is whether there has been any breach of trust of which the father has a right to complain. If this had been a case in which the Judge had exercised a discretion given him by the Order we should not have interfered, but in my opinion the case does not come within the Order at all.

BOWEN, L.J.:—

I also am of opinion that the order appealed from is wrong in any view of the case, for it ought to have provided that the costs

which were thrown away by not making the son a party in the first instance should be paid. If that had been done I should have been for supporting the order, as I do not feel quite satisfied that the case is not within Order XVI., r. 11, for the question whether there has been a breach of trust committed or not, is, as it seems to me, one of the questions in the action. I do not, however, dissent from the conclusion of the other members of the Court.

FRY, L.J.:—

I also am of opinion that the order appealed from ought to be discharged. Mr. *Chester* argues that the son is a party whose presence may be necessary to enable the Court to adjudicate upon all the questions involved in the cause. The defence is raised that the Plaintiff requested the trustees to make the investment of which he now complains as a breach of trust. That defence may be good or bad. If it be good, the Plaintiff has no cause of action, and he wishes to associate with him some one who has a cause of action. This, in my opinion, the Order does not authorize. If the defence be bad, the son is not a necessary party. In the present case the amendment would be inconvenient for another reason. If the defence prove to be good as against the father the trustees might wish to have him as co-Defendant, that his interest might be impounded. Without saying that they would lose this right if he was a co-Plaintiff, I think that they would be embarrassed in enforcing it.

Solicitor for Plaintiff: *J. B. Pittman.*
Solicitors for Defendants: *Walters, Deverell & Co.*

H. C. J.

Dicta of COTTON and FRY, L.JJ., at pp. 592, 595, *applied*. *Re* SANDBACH (*decd.*). [1951] 1 All E.R. 971.

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1885
April 16.

In re KNATCHBULL'S SETTLED ESTATE.

[1884 K. 518.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 25, 26, 53—*Payment of Prior Incumbrances—Land Drainage Charges—Improvement of Land Act*, 1864, (27 & 28 *Vict. c.* 114), *ss.* 49, 51, 66 [*Revised Ed. Statutes, vol. xiv., pp.* 992, 996].

Where a tenant for life of settled land has prior to the *Settled Land Act*, 1882, created charges for land drainage and improvements under the *Improvement of Land Act*, 1864, and other Acts, which were repayable by instalments, he will not be entitled under the *Settled Land Act*, s. 21, sub-s. 2, to have these charges paid out of the capital of the settled estates so as to relieve him from the payment of the instalments.

Trustees who purchase such charges will hold them upon trust to receive the instalments payable by the tenant for life, and to treat them as capital.

The decision of *Pearson*, J., affirmed.

THIS was an appeal from a judgment of Mr. Justice *Pearson* (1).

The application was made on a summons by Sir *Wyndham Knatchbull*, the tenant for life under a settlement dated the 12th and 13th of March, 1841, asking for a declaration that the trustees of the settlement might be directed, out of the capital money now in their hands, or out of the proceeds of the sale of lands subject to the settlement, and about to be sold under the powers of the *Settled Land Act*, to pay off and discharge certain incumbrances affecting the inheritance of the settled lands, namely, certain land drainage improvement charges, and that the costs should be paid out of the property subject to the settlement.

The settled estates were of the annual value of about £10,000, and the trustees held investments of about £10,000 in value. The estates were subject to certain land drainage charges created under the *General Land Drainage Act*, 1849, the *Improvement of Land Act*, 1864, and the *Limited Owners' Residences Act*, 1870. These charges, which had been effected between the 31st of August, 1867, and the 6th of April, 1882, amounted to £16,038 13*s.* 11*d.* The offices which advanced the money had agreed to accept payment of that amount in redemption of the charges. Mr. Justice

(1) 27 Ch. D. 349.

Pearson having refused to make the declaration asked for, Sir *W. Knatchbull* appealed.

Cozens-Hardy, Q.C., and *H. Lake*, for the Appellant:—

By the *Improvement of Land Act*, 1864 (27 & 28 Vict. c. 114), ss. 49, 51, and schedule B., the amount borrowed for improvement of the land is made a charge on the inheritance, and is therefore within sect. 21, sub-sect. 2 of the *Settled Land Act*, 1882, and may be discharged out of capital money. If these improvements had been effected since the passing of the *Settled Land Act* they would have been carried out under sect. 25 of that Act, and would have been paid for out of capital under sect. 21 sub-sect. 3. Therefore the payment of such charges is clearly within the policy of the *Settled Land Act*. The word "incumbrance" is defined in the *Conveyancing Act*, 1881, as including a charge of a portion, annuity, or other capital or annual sum. The insurance offices who advanced the money have agreed to accept payment of an immediate sum.

Cookson, Q.C., and *Church*, for the trustees, were not called on.

COTTON, L.J.:—

This is an application by way of appeal from a decision of Mr. Justice *Pearson*, and it asks that the trustees of the settlement may be at liberty to apply moneys in their hands which have arisen from a sale of property sold under the ordinary power of sale contained in the settlement in paying off and discharging certain incumbrances affecting the inheritance which have been created under the *Lands Drainage* and *Improvement Acts*.

Reliance is placed on the *Settled Land Act*, which enables money which is in the hands of trustees arising from the sale of estates to be applied as money arising from land sold under the Act could be applied; and these particular charges are created under the *Improvement of Land Act*, 1864. That Act provides that, where a person having a limited interest desires to effect improvements in his estate which he has not the means of doing out of his own money, he may apply to the Commissioners, and they may make an order sanctioning the proposed improvement,

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drainage, or other works, and saying that a certain sum will be proper to be expended. Sect. 27 gives the landowner who has only a limited interest a title to create a charge for that amount on the inheritance. Then when the improvement is effected, or when portions of the improvement are effected, the Commissioners give a charge on the inheritance for the sum so expended, and there is a provision as to how that is to be repaid. I say there is a charge on the inheritance for the sum expended. That I think is so; but there is an express provision as to the way in which that is to be paid, and there is also another section (66) which regulates the rights of the tenant for life and those having other limited interests as between themselves and those who are ultimately entitled. The 49th section enables the Commissioners, when the work is done, to give the charge for the sum which has been expended, the earlier section, 26, having enabled them to sanction the work and to say for what sum there shall be a charge. Then sect. 51, though the charge is on the inheritance, says that, "Every charge under this Act shall be created by way of rent-charge payable half-yearly, extending over the term of years fixed by the provisional or other sanctioning order." Then sect. 66 is important, because it provides that, "every landowner on whose land a charge shall have been made under this Act, and every succeeding tenant for life, tenant in tail, and other person having a limited interest in the land so charged, shall, as between himself and the persons in remainder or reversion, be bound to pay the yearly or other periodical payments of such charge which shall become payable during the continuance of his interest." As I understand the effect of that section it is this. There are improvements which will benefit the estate, but they are improvements which ought to be paid for not by a charge as to the interest only on the rents, and as to the principal money on the *corpus*; but they are to be paid by way of an annual sum upon this ground, that probably a great many of those improvements, although they would greatly benefit the owner of a limited interest who applies for them, yet after a certain number of years would cease to be productive of remuneration to the estate. All the charges in this case have thus been made for a limited period, the longest being thirty years from the present time.

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This money, therefore, was borrowed by the tenant for life, no doubt for the improvement of the estate, but on the terms that he, so long as his life lasted, should bear not only the interest of the charge, but should pay annually out of the rents so long as he remained tenant for life a certain proportion of the capital money, and that is in accordance with sect. 66, which I have read. It is not to be principal payable entirely out of *corpus*, and only interest out of rents and profits, but as between persons having a limited interest, and the persons entitled to the absolute interest in the estate, the persons having a limited interest are to bear part of the principal as well as the interest accruing during their lifetime, and if those interests last long enough they will have to repay the whole money borrowed, both principal and interest. It is proposed that this should be entirely altered, and that the person having a limited interest who has borrowed money on the terms mentioned, should be relieved entirely from the payment of the principal, and should only bear the interest. Is that right? It is said that it is the effect of the *Settled Land Act;* and if the *Settled Land Act* had in terms said that this might be done, it would be our duty to carry into effect the terms of the Act. But that the Act did not generally intend to interfere with existing rights, as between tenant for life and those entitled in remainder, is to my mind clear from the 53rd section of the Act. What that section says is this: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." The contention on the part of the Appellant is this, that under this Act the tenant for life may sell, he being at the time bound to pay the principal and interest on certain charges, and may apply the money which comes from the sale of the *corpus* in discharge of that liability, and throw the principal money entirely upon the *corpus*. Is that fair? What is relied upon is sect. 21. I have already said, that money in the hands of trustees may be applied in the same way as money produced by sale under the Act. Sect. 21 says, how capital moneys arising from a sale under the Act shall be applied. Sub-sect. 2 is relied upon. That sub-

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section is this: "In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land." Now, so far as we have any specific description there, with the exception of "Crown rent," whatever that may mean, all those things specified in the nature of a rent-charge are of a perpetual nature, and, so far as one sees, the land tax, the chief rent, and the quit rent would, if bought, be extinguished. Of course that would be so where they are charges permanently affecting the land, that is to say, charges which are to last as long as the land, the subject of the settlement, itself lasts. It is said that this charge created under the *Improvement of Land Act*, which I agree is a charge on the inheritance, comes within these words in the first part of this sub-section, and therefore they are not to be purchased, but the money is to be applied in paying them off in discharge and extinguishment of those charges which are created under the *Improvement of Land Act*, so as to alter entirely by that means the rights of the tenant for life and the remainderman *inter se*. In my opinion that is not the true construction of this section. Undoubtedly these are charges affecting the inheritance of the settled land, but not charges which in their nature are redeemable or capable of being discharged. If they are in fact paid off that will not be in consequence of the original bargain effected on the creation of this incumbrance. It will be by means of a new bargain which the persons advancing the money are willing to enter into, and which is made between those persons and the tenant for life, or the trustees acting on his behalf. It may be that the trustees can purchase these charges. But they would have to keep alive the charges payable to the persons advancing the money, and the tenant for life would have to bear out of the annual profits whatever remains of that portion of the capital which, in accordance with the terms of the original bargain, was to be paid out of the rents and profits. But that is not desired. In my opinion what is asked is not in accordance with this section, and though these are incumbrances affecting the inheritance, they are not incumbrances which in their nature are

capable of being discharged or being redeemed, having regard to this fact, that the Act under which they were created expressly requires that they shall be paid off by instalments, including interest and capital during a term of years, and expressly provides that a person having a limited interest, shall pay not only the interest on the capital but also his proportion of the capital remaining unpaid. It is true that under sect. 26 of the *Settled Land Act* power is given to apply moneys arising from sales effected under the Act in a way which would include drainage, the works done here, by means of borrowing. But that is a different matter. That is not altering the bargain on which the money was originally borrowed. Here it was borrowed on a contract which imposed on the tenant for life a certain obligation under sect. 66. We are asked to relieve him from that. When money is raised by sale of land under the Act, it may be applied subject to certain restrictions in any way sanctioned by the Act. But it is a different thing to say that sect. 21, to which I have referred, is so to be construed as entirely to alter the liability which exists as between the tenant for life and remainderman. I do not think that is the true construction of the Act. Independently of any other matter, I think that sect. 53 shews that it would be contrary to the intention of the Legislature if we were to accede to the application which is made here to apply these moneys in the way proposed.

LINDLEY, L.J.:—

I also think that the view taken by Mr. Justice *Pearson* of this section is the correct one. We are dealing with a settlement made before the *Settled Land Act*, and dealing with a tenant for life. The object of the application is that the tenant for life may discharge out of the capital certain rent-charges which he is bound to keep down out of the income. That is the substance of it. The question is whether that can be done.

Now, without going through the sections again, I will merely say, that having read carefully sects. 49 and 66 of the *Improvement of Land Act*, 1864, it appears to me that this terminal rent-charge is an incumbrance on the inheritance, and it also appears to me that sect. 66 compels the tenant for life to pay the instal-

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ments which become due during the tenancy, and precludes him from discharging himself of that at the expense of the remainderman. Apart from the *Settled Land Act* he could not, in the face of sect. 66 of the *Improvement of Land Act*, discharge the terminal annuity out of *corpus*, and relieve himself, as between himself and the remainderman, from the obligation imposed upon him by that section of the statute.

But we are asked to say that the *Settled Land Act* has altered that, and has enabled the tenant for life to exonerate himself at the expense of the remainderman from that statutory obligation. If you look at sect. 21 it is quite clear that, as far as the words go, it is clearly within the words, but you cannot construe that section apart from sect. 53, and you cannot, having regard to sect. 53 and sect. 66 of the *Improvement of Land Act*, come to the conclusion—I cannot at least—that it was the object of the *Settled Land Act* to enable a tenant for life to throw upon the remainderman the charges which he ought to bear himself, that is, I think, the shortest and best way of putting it. That being my conclusion it seems to me this summons goes too far. It may be, and in my opinion it is true, that the money may be applied in purchase of the rent-charges, but not in extinguishment of them for the benefit of the tenant for life. But that is the object of this application. It appears to me the effect of that would be to violate his duties towards the remainderman. I think, therefore, the appeal must be dismissed.

The observations which were made as to sect. 26 have been dealt with by Lord Justice *Cotton*. It is true under this Act something of this kind might be done in a different shape, that is to say, if the tenant for life had not already incurred this obligation, there is a method of improving the estate without his being put in the position in which he is having regard to the mode which has been adopted in this case. But that is a totally different state of things, I therefore think that the appeal ought to be dismissed.

FRY, L.J.:—

I am of the same opinion. The money in question was borrowed under the provisions of the *Improvement of Land Act*, 1864, and

under the provisions of that Act a rent-charge was created, and under sect. 66 of that Act the present tenant for life, as between himself and the persons in remainder, was under a statutory obligation to pay the yearly or other periodical payments of that charge. He seeks to discharge himself from that by an operation under the *Settled Land Act*, 1882. He has contended in effect that the provisions which I have referred to in the Act of 1864 are repealed by the Act of 1882. He relies upon the 2nd sub-section of the 21st section of that Act, which enables the money arising from the sale of land to be applied in discharge, purchase, or redemption of incumbrances affecting the inheritance. It appears to me in the present case that he cannot apply it in discharge or redemption. The incumbrance does not provide for any other method of discharge than by the annual payments. Therefore there is no method of discharging it by the payment of a capital sum. There is no power of redeeming it by the payment of a capital sum. The only possible power, therefore, would be to apply capital sums in the purchase of the incumbrance. That may be within the power given by sub-sect. 2, and as at present advised I think that it is. But the result would be a purchase which would not extinguish the liability of the tenant for life under sect. 66 of the Act of 1864. Therefore the trustees in my judgment might purchase this incumbrance if the persons entitled to it were willing to sell it; but they would hold it as trustees, and they would be under the obligation to compel the tenant for life to make the payments which, under sect. 66, he was bound to make. That is a purchase which at this time the trustees do not desire. They wish to discharge or redeem this security, but that is an operation which they have no right under the Act to perform, and therefore I agree that this appeal must be dismissed.

Solicitors: *Lake, Beaumont, & Lake; H. J. Bell.*

M. W.

C. A.
1884
PEARSON, J.
Dec. 20.
1885
March 18.
C. A.
1885
April 22.

DAVIES *v.* MAKUNA.

[1884 D. 2504.]

Medical Practitioner—Unqualified Person—Right to sue—Apothecaries Act (55 *Geo.* 3, *c.* 194), *s.* 14 [*Revised Ed. Statutes, vol. v. p.* 442]—*Medical Act*, 1858 (21 *&* 22 *Vict. c.* 90), *ss.* 32, 40 [*Revised Ed. Statutes, vol. xiii. p.* 372].

The Act 55 Geo. 3, c. 194, prohibiting medical practice by unqualified persons is not repealed by implication by the *Medical Act*, 1858.

The Defendant, a duly qualified medical practitioner, agreed with the Plaintiff, a medical practitioner not duly qualified, but who was described in the agreement as "medical practitioner," to serve the Plaintiff as assistant in his profession as a medical practitioner, and not to practise at *R.* within five years after the close of the engagement. The Plaintiff applied for an injunction to prevent the Defendant from practising at *R.* in breach of this agreement:—

Held, by *Pearson*, J., that the *Medical Act* of 1858 does not prohibit unqualified persons from practising medicine, its object being only to enable the public to distinguish between qualified and unqualified practitioners—that the use by an unqualified person in a private agreement with another medical man, of any of the titles for the wilful use of which by an unqualified person, for the purpose of deceiving the public, penalties are imposed by sect. 40 of the Act, is not an offence within that section—that the agreement therefore was not illegal, and that the Plaintiff could enforce its terms, and was entitled to an injunction.

The Defendant appealed, and on appeal shewed that the Plaintiff had given various certificates of cause of death, which shewed that the Plaintiff had attended the deceased persons during their last illness, and from which it was to be inferred that he attended patients in the way in which a medical practitioner ordinarily attends, and in fact personally acted as an apothecary:—

Held, that his doing so was made illegal by the Act 55 Geo. 3, c. 194, s. 14, that the agreement therefore was to assist the Plaintiff in carrying on a business which he could not lawfully carry on, and that the agreement was illegal and could not be enforced:—

Semble, if the Plaintiff had carried on his business by means of duly qualified assistants, without personally acting as a physician, surgeon, or apothecary, the agreement might have been legal.

THE writ in this action claimed an injunction to restrain the Defendant from exercising or carrying on the profession of doctor of medicine, surgeon, apothecary, or accoucheur at *Ystrad Rhondda*, in *Glamorganshire*, or within ten miles thereof.

On the 1st of November, 1883, an agreement was entered into between *Idris Davies* (the Plaintiff) who was described in the agreement as a "medical practitioner" of *Ystrad Rhondda*, of the one part, and *M. D. Makuna* (the Defendant) who was described as a "medical assistant," of the other part, by which *Makuna*, for the consideration thereinafter mentioned, agreed with *Davies* that he would diligently and faithfully serve *Davies* as assistant in his profession as medical practitioner and accoucheur at *Ystrad Rhondda*, for the space of one year from the date of the agreement, and so on from time to time until the contract should be determined by either of the parties thereto in manner thereinafter provided. And *Davies* agreed to pay and allow to *Makuna* a salary at the rate of £100 a year, paid monthly, as an indoor assistant. And it was thereby mutually agreed between the parties thereto that either of them should be entitled to put an end to the said term of service during the first or in any subsequent year thereof by giving to the other of them one calendar month's notice in writing. And *Makuna*, for the consideration aforesaid, did thereby agree that he would not at any time during the continuance, nor during the next five years after the determination, of the contract of service, except with the written consent of *Davies*, exercise or carry on the profession of doctor of medicine, surgeon, apothecary, or accoucheur, or any of them, at *Ystrad Rhondda*, or within ten miles in any direction, either on his own account or in partnership with or as assistant to any other person or persons.

Makuna was a duly qualified medical practitioner registered under the *Medical Act*, 21 & 22 Vict. c. 90; *Davies* was not. In August, 1884, the Defendant's engagement was terminated by notice from the Plaintiff. In September, 1884, the Defendant commenced practising as a doctor of medicine on his own account at *Ystrad Rhondda*. This action was commenced on the 27th of November, 1884.

The Defendant deposed that on the 1st of November, 1883, when he visited the Plaintiff at his residence at *Ystrad Rhondda*, there was on the mantelpiece of the sitting-room a brass plate bearing the Plaintiff's christian name and surname, with the addition of the words "Physician and Surgeon." This statement was denied

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by the Plaintiff, who deposed that there never had been any brass plate on the mantelpiece in his sitting-room, or elsewhere in or about his house. The Plaintiff admitted that though he had received a medical training, and was an M.D of an American university, he was not qualified to be registered under the *Medical Act*.

The Plaintiff moved for an injunction, in the terms of the claim indorsed on his writ, until the trial of the action.

The motion was heard before Mr. Justice *Pearson* on the 20th of December, 1884.

Everitt, Q.C., and *St. John Clerke*, for the motion :—

The Defendant's covenant not to practise is not open to any objection on the ground that it is in restraint of trade, for it is sufficiently limited both as to time and space. It is not more extensive than is required for the Plaintiff's protection, and valuable consideration was given for it.

The Defendant's main objection is, that the Plaintiff cannot maintain the action, because he is not a duly qualified medical practitioner under the *Medical Act*, 1858 (1). But that Act does not prohibit unqualified persons from practising, it only prevents them from recovering fees, and inflicts a penalty upon them for the wilful use of certain titles which imply that they are duly qualified. In this respect the Act differs from the *Apothecaries*

(1) The preamble of the Act states : "Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners."

Sect. 32 : "After the 1st day of January, 1859 no person shall be entitled to recover any charge in any Court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act."

Sect. 40 : "Any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding twenty pounds."

Act, 55 Geo. 3, c. 194, s. 14 (1) of which absolutely prohibited unqualified persons from practising. This was also the case with the Act 14 & 15 Hen. 8, c. 5. The proof of registration required under the *Medical Act*, in order to enable a plaintiff to recover fees, is proof that he is registered when the proof is tendered in evidence: *Haffield* v. *Mackenzie* (2); *Turner* v. *Reynall* (3); *Philpott* v. *St. George's Hospital* (4).

There is nothing to release the Defendant from his agreement.

Gatey, for the Defendant:—

The Plaintiff is not entitled to practise at all: 3 Hen. 8, c. 11, s. 1, 2 (5). The terms of the agreement are such as to bring the Plaintiff within the *Apothecaries Act*.

The agreement describes the Plaintiff as a "medical practitioner." The Act of 1858 recognises as medical practitioners no one but the persons mentioned in Schedule A. Consequently, the Plaintiff has in effect assumed a description to which he is not entitled, and has thus contravened the provisions of the Act. The action is really brought for the specific performance of the agreement, and the Court will not assist the Plaintiff when the

(1) Sect. 14 provided that "to prevent any person or persons from practising as an apothecary, without being properly qualified to practise as such, from and after the 1st of August, 1815, it shall not be lawful for any person or persons (except persons already in practice as such) to practise as an apothecary in any part of *England* or *Wales*, unless he or they shall have been examined by the Court of Examiners" of the Apothecaries Company and have received a certificate from them.

(2) 10 Ir. C. L. 289.

(3) 14 C. B. (N.S.) 328.

(4) 6 H. L. C. 338.

(5) By sect. 1 it was provided "that no person within the city of *London*, nor within seven miles of the same, take upon him to exercise and occupy as a physician or surgeon, except he be first examined, approved, and admitted by the Bishop of *London*, or by the Dean of *Paul's* for the time being, calling to him or them four doctors of physick, and for surgery other expert persons in that faculty." And by sect. 2, "that no person out of the said city, and precinct of seven miles of the same, except he have been (as is aforesaid) approved in the same, take upon him to exercise and occupy as a physician or surgeon, in any diocese within this realm, but if he be first examined and approved by the bishop of the same diocese, or, he being out of the diocese, by his vicar general; either of them calling to them such expert persons in the said faculties, as their discretion shall think convenient."

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agreement is contrary to the policy of the law and is tainted with illegality.

The covenant is in restraint of trade, and is bad, because it is too wide: *Pollock* on Contracts (1); *Hitchcock* v. *Coker* (2); *Horner* v. *Graves* (3).

Everitt, in reply:—

The covenant is not too wide for its purpose. The *onus* is on the Defendant to shew that it is: *Rousillon* v. *Rousillon* (4). There is no evidence that the Plaintiff has practised as an apothecary; at any rate he employs duly qualified assistants, and in that way he would not incur any penalty. Sect. 40 of the Act of 1858 does not prohibit an unqualified person from using the description "medical practitioner;" that is a neutral term. It is a mere statement of a fact. The Act only prohibits an unqualified person from holding himself out to the public as qualified. The Plaintiff has not done this. Sect. 40 is a penal clause, and must be construed strictly.

1885. March 18. PEARSON, J. (after stating the facts, continued):—

The objection to the action which has been taken with reference to the *Medical Act* of 1858 has been put in two ways. In the first place it is said that the Plaintiff is not, and, as matters now stand, cannot be, a properly qualified medical practitioner under the Act; and, secondly, that, that being so, the Defendant's covenant is too large, is wider than is required for the purpose for which it was entered into, and that it is therefore bad.

The first question which I have to determine is, what does the Act order, and how far does it leave persons at liberty, notwithstanding the provisions contained in it. I do not think it necessary to recur to the interesting old Act of Parliament to which Mr. *Gatey's* industry referred me. I think it is quite sufficient for me to begin with the Act of Geo. 3. [His Lordship read sect. 14 of the Act of Geo. 3.] There is, therefore, in that Act an

(1) 3rd Ed. pp. 326 *et seq.*
(2) 6 A. & E. 438, 454.
(3) 7 Bing. 735.
(4) 14 Ch. D. 351, 365.

express prohibition against any person acting as an apothecary except one who is qualified according to the Act.

But when I come to the Act of 1858, I find that it begins with this preamble, "Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners." Now, to my mind, that preamble shews what the whole purport of the Act was, and the extent to which its provisions were intended to go. It is not an Act to prevent unqualified practitioners from practising, but it is an Act to enable the public to distinguish between qualified and unqualified practitioners. Then it takes away from an unqualified practitioner the power of recovering any fees; but, if it had been intended to prevent any unqualified person from practising, that section would have been wholly unnecessary: the Act would have simply prohibited any such person from practising. No doubt it is difficult to understand the exact limit of sect. 40, and I do not mean to say that I am absolutely certain what is the proper construction of it. But, looking at the preamble of the Act and at sect. 32, I think the meaning is, that in order to incur the penalty a person must wilfully and falsely take or use one of the names or titles therein mentioned in such a manner as is calculated to deceive the public. I do not think that the use of one of those titles by an unqualified practitioner, either in a private agreement with another medical man, or on a brass plate not exposed to the public view, would be an infringement of this section. I cannot say why the provisions of the Act were limited in this way; possibly it was not thought necessary to prevent all unqualified persons from practising; and it may well be that the Legislature, knowing the habits and customs of the English people, were willing to leave a wide door open, particularly to those, such as rectors' wives and other Ladies Bountiful, who with little experience and large benevolence delight to practise the art of medicine without many injurious results. But, however that may be, I do not see that it has been brought home to the Plaintiff that he has done anything improper, although he is not, and cannot be, as matters stand, a qualified practitioner under this Act.

This, I think, decides the whole question between the parties,

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for, if that be so, there was no reason why he should not enter into this agreement with the Defendant, and there is no reason why the Defendant, having entered into the agreement, should not keep it. I must therefore grant the injunction as asked.

It was then arranged that the operation of the injunction should be suspended, pending an appeal, the Defendant undertaking to keep an account.

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The Defendant appealed.

On the hearing of the appeal, further evidence was adduced on behalf of the Defendant, from which it appeared that in the course of the year 1884 the Plaintiff had signed certificates of the cause of death of various persons, to be delivered to the Registrar under the *Births and Deaths Registration Act*, 1874. By each of these the Plaintiff certified that he attended the deceased during his last illness, and stated the cause of death. The certificates specified were twelve in number, and the causes of death mentioned were meningitis and convulsions, phthisis, cardiac disease and apoplexy, diarrhœa, convulsions, measles and convulsions, apoplexy, bronchitis, infirmity and anasarca, bronchitis and convulsions, pneumonia and convulsions. The Plaintiff did not in these certificates represent himself to be a qualified practitioner.

Evidence was also given that on the 30th of March, 1885, the Plaintiff was convicted and fined at the petty sessions for assuming the title of doctor of medicine. The Plaintiff by affidavit stated that the circumstances under which he was convicted were, that he was connected with certain collieries in the neighbourhood of *Rhondda*, and had frequently to give to friendly societies certificates of the death or illness of members, and that in one of such certificates he accidentally signed "*John Davies*, M.D.," omitting the letters *U.S.* (*United States*), which he was in the habit of adding, and that on this certificate he was convicted. That he was taking steps to appeal, as he was advised that the conviction was erroneous, the omission being by inadvertence.

The Plaintiff, by his further evidence on the appeal, deposed that his assistants, who were qualified apothecaries, invariably

attended to that portion of his practice which involved acting in that capacity. That, not being himself registered as an apothecary, he did not compound or dispense medicines, but required his assistants, who were qualified as aforesaid, to perform that duty.

The appeal was heard on the 22nd of April, 1885.

Gatey, for the Appellant:—

We depend on the ground that the agreement was illegal because the Plaintiff was not a duly qualified medical practitioner, and, therefore, his business was illegal. The first statute bearing on the subject is 3 Hen. 8, c. 11, which prohibits any one from practising as a physician or surgeon unless examined and approved as therein mentioned, viz., in *London* by the Bishop or the Dean of *St. Paul's*, and in the country by the Bishop of the diocese. The Act, 32 Hen. 8, c. 40, exempts physicians. The Act, 32 Hen. 8, c. 42, incorporated the barbers and surgeons into one corporation, whose privileges were confirmed and enlarged by a charter of 5 Car. 1, which is recited fully in 18 Geo. 2, c. 15. That charter contains only regulations as to practice in or near *London*. The statute authorizes persons examined by the *College of Surgeons* to practise, but it contains nothing to take away from the effect of the prohibitions in the earlier Acts. Then, 55 Geo. 3, c. 194, s. 14, prohibits the practising as an apothecary without qualification. These Acts make it illegal for any unqualified person to practise as a surgeon or apothecary, and they are not repealed by the *Medical Act* of 1858. In *Dallax* v. *Jones* (1) the Act 3 Hen. 8, c. 11, was treated as being in force. Mr. Justice *Pearson* relied on the preamble of the *Medical Act* of 1858 (21 & 22 Vict. c. 90), as defining the objects of the Act, but the Act 23 Vict. c. 7, s. 1, treats title to registration and qualification to practise as two distinct things, and shews the intention of the former Act to have been something more than providing a register. Sect. 15 of 21 & 22 Vict. c. 90 provides for a register, sect. 31 provides that every person registered shall be entitled to practise, thus impliedly excluding other persons, and sect. 32 prohibits persons not registered from recovering fees.

(1) 26 L. J. (Ex.) 79.

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[FRY, L.J.:—Does not that go far to shew that there is no prohibition in the Act against unqualified persons practising?]

Even if this Act does not prohibit it, the prohibitions in the earlier Acts remain. The Plaintiff's describing himself in the agreement as a medical practitioner was in itself an offence under sect. 40 of the Act. *Haffield* v. *Mackenzie* (1) was referred to as shewing that an unqualified person could practise, but it was cited and not followed in *Leman* v. *Houseley* (2). The Plaintiff says he has only carried on his business by means of duly qualified assistants, but the certificates as to causes of death shew that he personally acted as surgeon and apothecary. The statute 34 & 35 Hen. 8, c. 8, enables unauthorized persons to administer medicines without charge, which disposes of the considerations urged by Mr. Justice *Pearson* in the latter part of his judgment.

Everitt, Q.C., and *St. John Clerke*, *contrà*:—

The Act of 1858 contains no prohibitory section, and does not make it illegal for an unqualified person to practise.

[FRY, L.J.:—The argument against you is that it does not repeal the prohibitions in the earlier statutes.]

There is a series of enactments which virtually repeal them. The Act goes on the assumption that there is no fetter, and the machinery provided by the old Acts is gone. They are repealed by implication. The Act 14 & 15 Hen. 8, c. 5, supersedes 3 Hen. 8, c. 11, so far as physicians are concerned. The Act 32 Hen. 8, c. 40, s. 3, shews that physician includes surgeon. By the *Medical Act* of 1860, 23 & 24 Vict. c. 66, s. 5, the Act 14 & 15 Hen. 8, c. 5, was repealed as regards physicians, so the prohibition contained in it is gone.

[COTTON, L.J., expressed an inclination to the contrary view.]

The 15th section of the Act of 1858 provides that persons having the qualifications there mentioned may be registered, and those qualifications proceed on the assumption that the modes of obtaining qualifications prescribed by the old Acts are not in force. A penalty imposed for not obtaining a qualification, which

(1) 10 Ir. C. L. 289. (2) Law Rep. 10 Q. B. 66.

cannot now be obtained, cannot now be enforced consistently with the later Act.

[COTTON, L.J.:—A penalty imposed on persons who practise without being qualified is not necessarily repealed because a new mode of becoming qualified is substituted for the old one.]

Then, assuming that the Plaintiff cannot lawfully in person do surgeons' and apothecaries' work, he employs duly qualified assistants to perform them. He employs duly qualified assistants to do everything which he cannot lawfully do in person, and he is only practising himself as a medical practitioner, against which there is no prohibition.

[COTTON, L.J.:—How can a man be practising as a medical practitioner if he practises neither as physician, surgeon, nor apothecary?]

COTTON, L.J.:—

This is an appeal by the Defendant from an order of Mr. Justice *Pearson* granting an injunction to compel him to abide by the terms of an agreement entered into between him and the Plaintiff. The Defendant has broken the agreement, and we cannot look with any favour on his conduct, but we must decide the case according to the principles of the Court. The Plaintiff carries on business as a medical practitioner at *Rhondda* in *Wales*, and advertised for an assistant. The Defendant is a duly qualified medical practitioner. On the 1st of November, 1883, a written agreement was entered into by Plaintiff and Defendant that the Defendant should serve the Plaintiff as his assistant in his profession as medical practitioner and accoucheur at *Rhondda*, at a yearly salary, the engagement being determinable by either party at a month's notice; and the Defendant stipulated that he would not during the continuance of the engagement, or within five years after its determination, except with the written consent of the Plaintiff, exercise or carry on the profession of doctor of medicine, surgeon, apothecary, or accoucheur, at *Rhondda*, or within ten miles of it. In August, 1884, the engagement was determined, and in the following month the Defendant commenced practising as a doctor of medicine at *Rhondda*. The ground on which the Defendant resists the injunction is that the agreement was to

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assist the Plaintiff in the conduct of the business which he was at that time carrying on, that the business was one which he could not legally carry on, and that the agreement therefore is void for illegality. The Plaintiff admits that he has no qualification to act as surgeon, apothecary, or physician, but says that he carries on those branches of his business by means of duly qualified assistants, and not personally. If that had been the real state of the case, I am at present of opinion, though it is not necessary to decide the point, that as the Defendant knew the circumstances when the agreement was entered into, it could have been enforced against him, for that the Plaintiff would be doing nothing illegal. But is that the state of the case? To my mind it is not shewn to be so. I do not go into the question whether the Act 3 Hen. 8, c. 11, is still in force as regards the penalties imposed on persons practising without being duly qualified. But there is the Act 55 Geo. 3, c. 194, s. 14, which prohibits the acting as an apothecary without being duly qualified. The Act does not define the nature of an apothecary's employment, but dispensing, mixing medicine, giving medical advice, and attending the sick as medical adviser, must be considered acting as an apothecary. It is alleged by the Defendant that in the present case the Plaintiff has done these things in person. It is deposed to that he has in his room a brass plate on which he is described as "physician and surgeon," and though this can only be seen by patients who come to him, it tends to shew that he is not the mere centre of a staff of qualified assistants, but is himself carrying on the business of the medical profession in various forms. The agreement moreover describes him as "medical practitioner." Then an affidavit which was not before Mr. Justice *Pearson*, verifies a set of certificates of death stating the cause of death, which implies that the Plaintiff had attended them and prescribed the requisite medicines, thus acting as an apothecary. The result of the evidence at present appears to me to be that the Plaintiff is exercising a profession which he is not at liberty to carry on in *England*. The case appears not to have been fully before Mr. Justice *Pearson*, for he proceeds on the *Medical Act* of 1858 alone, and if there had been no other Act in the case I should have been disposed to agree with him; but, as the evidence at present stands, I think that the Plaintiff must be taken to have been carrying on a

business which the Act 55 Geo. 3, c. 194, prohibited him from carrying on, that the agreement therefore was illegal, and that he cannot enforce it.

LINDLEY, L.J. :—

I have come to the same conclusion. If it were necessary to determine how far the Act 3 Hen. 8, c. 11, is still in force, I should wish to take time to consider, but when we look at the agreement and the facts I think it is not necessary to determine that question. The agreement describes the Plaintiff as a medical practitioner, and the evidence shews what kind of business he carries on. The affidavit which was not before Mr. Justice *Pearson* shews that he carries on the work of a surgeon, physician, and apothecary. The object of the agreement was to get the Defendant's assistance in carrying on this business which the Plaintiff was prohibited by the Act 55 Geo. 3, c. 194, from carrying on. It was a scheme to allow a medical man to practise without being duly qualified.

FRY, L.J. :—

I am of the same opinion. By the agreement the Defendant agrees to serve the Plaintiff as his assistant in his profession carried on at *Rhondda*. What was the profession carried on by the Plaintiff ? It is suggested that it was a medical profession carried on entirely by means of duly qualified assistants. If that had been so, I am far from saying that the agreement might not be valid. But, upon the evidence, I come without hesitation to the conclusion that the Plaintiff acted as an ordinary medical practitioner does, and if so, the agreement was that the Defendant should assist the Plaintiff in a business which the Plaintiff could not lawfully carry on. If so, we cannot interfere. Possibly the covenant may be construed distributively—it is not my present impression that it can—but in the existing state of circumstances, bearing in mind that this is an interlocutory proceeding, I think that we should be doing wrong if we supported the injunction.

Solicitor for Plaintiff: *S. E. Lambert.*
Solicitors for Defendant: *Pridham & Piper.*

H. C. J.

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CHITTY, J.
March 24, 25.

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April 29.

In re FIELD.

Solicitor—Pending Business—Negotiations for Lease—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 7—*General Rules under Solicitors' Remuneration Act*, 1881, *rule* 2 (*a*), (*b*), (*c*); *Sched. I., Part II.*

Negotiations for a lease were carried on through the lessor's solicitor for two years before the rules under the *Solicitors' Remuneration Act*, 1881, came into operation. After they came into operation terms were come to, and a lease executed. The solicitor in his bill charged for the negotiations, and also charged the amount fixed by Sched. I., Part II., to the rules, as remuneration "for preparing, settling, and completing lease and counterpart." The Taxing Master disallowed all the items for negotiations, and Mr. Justice *Chitty* affirmed his decision. The solicitor appealed:—

Held, by the Court of Appeal, that though the business had been commenced before the rules came into operation, the taxation must be conducted according to the rules, the solicitor not having declared his election to the contrary.

Whether he might on the rules coming into operation have effectually declared such election, *quære*.

Held, further, that having regard to rule 2, the amount fixed by Sched. I., Part II., included the charges for negotiations, and that the appeal must be dismissed.

MR. *ELLIS*, being entitled to a lease of *Adelaide House*, at *St. Leonards*, for a term which would expire in 1888, commenced in August, 1880, negotiations for a renewed lease. The negotiations went on through Mr. *Field*, the solicitor of the lessors. On the 24th of April, 1883, written heads of terms of lease were finally agreed to. The lease was to be for twenty-seven years from Michaelmas, 1882, at £300 a year during the first six years and £325 for the rest of the term. The last clause of the terms was, "The landlords and tenant to respectively execute a lease and counterpart, to be prepared by the landlords' solicitor upon the terms aforesaid, and the reasonable costs and expenses of the landlords in relation to the negotiations and the lease to be paid by the tenant."

In October, 1883, the new lease was executed, and on the 19th Mr. *Field* sent in to Mr. *Ellis* his bill of costs. This bill contained charges from August, 1880, to the 24th of April, 1883, amounting in all to £16 5*s.* 2*d.*, for costs in respect of the negotiations. The preparing, settling, and completing the lease and counterpart

were then charged, £13 2*s.* 6*d.*, according to the scale in Sched. I., Part II., to the rules under the *Solicitors' Remuneration Act*, 1881. The total of the bill, including expenses of valuer, stamps, &c., was £66 12*s.* 2*d.*

Mr. *Ellis* being dissatisfied with the bill, obtained on the 13th of December, 1883, an order to tax it. The Taxing Master struck out the costs in respect of the negotiations, thus reducing the bill to £50 7*s.*, from which he taxed off £18 3*s.* 8*d.*, leaving £32 3*s.* 4*d.* Among the items disallowed were charges by the solicitor for a journey by him to *St. Leonards* to see the property with the valuer, and a journey to *Walmer* to procure the execution of the lease. The Taxing Master also disallowed a charge for preparing heads of terms of the lease, and reduced the charges of the valuer.

Mr. *Field* carried in objections, of which those only relating to the charges connected with the negotiations need be noticed. He objected to the disallowance of them:—

1. Because the agreement between the parties states "that the reasonable costs and expenses of the landlords in relation to the negotiations and the lease are to be paid by the tenant." By striking out all the items prior to the item for preparing lease no effect is given to the express mention of the negotiations.

2. Because upon the true construction of the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881, the scale of charges in Part II. of Sched. I. thereto does not include negotiations for a lease. Under clause 2, sub-sect. (*c*) of such Order, therefore, negotiations for a lease are business the remuneration for which is not thereinbefore or in Sched. I. thereto prescribed, and therefore the remuneration for the same is to be regulated according to the former system as altered by Sched. II. thereto.

3. Because the negotiations in the present case having been begun and for the most part carried on before the 31st of December, 1882, are not subject to the said General Order.

4. Because a solicitor is never to be compelled to be remunerated by scale without having an option of electing to be remunerated in detail under clause 6 of the said Order, and in the present case it would not have been possible for the solicitor to make any such election before commencing the negotiations, the said General Order not being then in operation or existence.

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The Master disallowed the objections, and gave the following reason as regarded objection 2:—

"The language of Part II. about scale of charges, as to leases, &c., must be read in connection with the language of Order 2 (*b*). This (*b*) obviously means that the scale charge for the lease shall cover the whole transaction.

"If the solicitor is not satisfied with the scale charge he may avail himself of Order 6, but he must do so by writing communicated to the client."

Mr. *Field* took out a summons to review the taxation, which was adjourned into Court, and heard by Mr. Justice *Chitty* on the 24th and 25th of March, 1885.

Ince, Q.C., and *A. W. Rowden*, in support of the summons:—

1. It is provided by the agreement of April, 1883, that the items which have been struck out, being costs incurred by the lessor "in relation to the negotiations," shall be paid by the lessee.

2. The scale of charges in Part II. of Sched. I. to the General Order under the *Solicitors' Remuneration Act*, 1881, does not include negotiations for a lease, and therefore under rule 2 (*c*) this is business the remuneration for which is not thereinbefore or in Sched. I. thereto provided; and the remuneration must be regulated according to the former system as altered by Sched. II. thereto.

3. These negotiations having commenced and been for the most part carried on before the 31st of December, 1882, are not regulated by the General Order, which is not retrospective.

The solicitor ought not to be compelled to accept the scale remuneration without the opportunity of electing to be remunerated in detail under rule 6; but here, as the General Order was neither in operation nor in existence before the negotiations were undertaken, the solicitor could not have made his election.

As this is a third-party taxation, the third party places himself in the position of the client, and can take objection to nothing that the client could not himself object to: *Re Massey* (1).

(1) 34 Beav. 463.

Romer, Q.C., and *J. D. Davenport*, *contrà*:—

There is nothing special about this case to justify so high a bill; and the items are for the most part quite inadmissible. The employment of a solicitor on behalf of the lessor in the preliminary negotiations was quite unnecessary, the solicitor's duty commencing only with the preparation of the lease. As the general order does not provide for the payment of any fee to the solicitor for negotiations which result in the granting of a lease, it must be considered that the scale fee fixed for the preparation of a lease and counterpart was intended as a sufficient recompense to the solicitor for his trouble. They cited *Raymond* v. *Lakeman* (1).

Ince, in reply.

CHITTY, J.:—

The Taxing Master was, I think, right in his view. The question is whether a solicitor, in addition to the scale charge for a lease, can also charge for the preliminary negotiations which resulted in that lease. The scale of charges in Sched. I. Part I., which relates to sales, purchases, and mortgages, contains allowances to solicitors for negotiating a sale of property by private contract, and for negotiating a purchase of property by private contract, but no allowance is made for negotiating a lease; the scale of charges in Sched. I. Part. II., as to leases mentioning only an allowance to lessor's solicitor "for preparing, settling, and completing lease and counterpart."

In my opinion the principle upon which the rules and scales of charge were framed was this:—

It was considered that in the case of every lease there must be some negotiation, but that as the scale of charge was intended to fix in a more or less rough manner the remuneration of solicitors, the scale of charges for the lease itself was intended to include all preliminary negotiations and attendances. The solicitor in this case could have given notice under rule 6 that his remuneration should be in accordance with the present system as altered by Sched. II., or he need not have come under these rules at all, because the business was commenced before 1883, and as he did

(1) 34 Beav. 584.

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not give notice that he did not intend to charge according to the scale, it appears to me that he has elected to charge according to the scale charge. Solicitors take these matters for better for worse. There is, as I have often heard the late Master of the Rolls observe, a kind of give and take in these matters. They get more in one case and less in another, and for this reason very likely in settling this scale some sort of rough and ready rule for regulating the remuneration was laid down. I am of opinion that the solicitor is not entitled to charge for the negotiations which preceded the lease. In this case a paper of terms was signed called "Heads of terms of lease." It was not intended to operate as a binding agreement for a lease, but merely as instructions from which a lease could be prepared; and the argument that the solicitor was entitled to a double charge, one for these "Heads of terms of lease," and another for the lease itself, is not in my opinion well founded. As to the amount that the Taxing Master has allowed the Court does not interfere unless there has been some mistake in principle. With the disallowance of expenses of the journey to *St. Leonards* of the solicitor and surveyor I cannot therefore interfere. Nor shall I interfere with his discretion in refusing the expenses to *Walmer*. It is not necessary to say more than that the solicitor has failed to make out as a matter of fact that it was necessary. He has shewn no special authority on the part of the lessor, so as to prevent the lessor from taxing these items, nor any special agreement to pay this amount. One more observation. The rent reserved by the lease is £325; the lease itself is a very ordinary one, presenting no special difficulties, and I think the solicitor was not justified in bringing in so large a bill as £66 12*s.* 2*d.* The Taxing Master has taxed the bill on no illiberal scale, and taking the business all round has allowed a sufficient remuneration.

F. G. A. W.

C. A.

Mr. *Field* appealed, and the appeal was heard on the 29th of April, 1885.

Ince, Q.C., and *A. W. Rowden*, for the Appellant:—

We say, first of all, that the rules do not apply, the business having begun before they came into operation. By rule 6 the

rules are not to apply, where a solicitor elects, before undertaking the business, to be paid according to the old scale; and they cannot apply to a case where, the business having been undertaken before the rules, this option could not be exercised. But supposing the rules do apply, we say that the negotiation is extra work for which the solicitor is to be paid under rule 6 (*c*). It is work not provided for by Part II., of Sched. I., which gives remuneration only "for preparing, settling, and completing lease and counterpart" not saying anything about negotiations, whereas Sched. I. Part I., expressly provides for them in the case of sales and mortgages. The Sched. I. Part II., provides then for the usual work incident to a lease, leaving negotiations to be paid for under rule 2 (*c*) according to the old scale as modified by Sched. II. That sub-section provides for recourse to the old scale in a class of cases where there is usually negotiation through a solicitor, which in the case of ordinary leases there generally is not.

[FRY, L.J.:—How can you say that the case is not within the rules, when you send in an *ad valorem* charge, for the lease and counterpart?]

If the whole transaction is treated as one to which the scale does not apply, it may be that we ought to have sent in a detailed bill on the old footing, but the solicitor might well consider that, as the lease was prepared and executed after the rules came into operation, he ought to give the client the benefit of them as to that. Mr. Justice *Chitty* in his judgment omits all notice of the fact that Sched. I. Part II., defines and limits the work to be done for the remuneration there mentioned. The decision strikes out of the agreement the charges for negotiation which are expressly mentioned there.

[FRY, L.J.:—That is not an agreement with the solicitor.]

Davenport, contrà, was desired by the Court to confine himself to the question whether the case came within the rules, the business having been commenced before the Act.

Sect. 7 of the Act evidently imports that the taxation of all bills delivered after the rules come into force is to be according to the rules; and the point was decided in *In re Lacey & Son* (1).

(1) 25 Ch. D. 301.

C. A. 1885 *In re* FIELD.

Ince, in reply:—

The only just construction is either, that where the business is before the rules the taxation is not governed by them at all, or that the business done after they came into force is governed by them, and the work done before is to be paid for separately.

COTTON, L.J.:—

In this case negotiations for a lease were carried on through the lessor's solicitor for many months before the rules under the *Solicitors' Remuneration Act*, 1881, came into operation, but a final agreement was come to and the lease executed after that period. In his bill the solicitor charged for negotiations both before and after the time when the rules came into operation and also charged the percentage allowed by Sched. I., Part II., to the rules. The Taxing Master struck out all the items relating to the negotiations, and Mr. Justice *Chitty* affirmed his decision. The solicitor has appealed.

The first ground which he takes is, that the Act does not apply. Rule 6 provides that, "In all cases to which the scales prescribed in Sched. I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto." Here it was said that the solicitor could not exercise his option because the business was in full swing before the rules came into operation, and that the scale therefore could not apply. This argument is forcible, but I think it cannot prevail when we look at the 7th section of the Act: "As long as any general order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby." No doubt the application of the Act to pending business alters the contract under which the business was undertaken, but this alteration may in some cases be for the benefit of the solicitor. It may be that if a solicitor, after the rules came into operation, gave notice that he elected to have remuneration for business then pending according to the old system as modified by Sched. II., we should hold such a notice effectual. Here the solicitor did nothing of the kind, for he claimed percentage under the rules, and we cannot get out of

sect. 7. It has been decided in *In re Lacey & Son* (1) that the rules apply to pending business.

It was argued that the agreement gave the solicitor a right to more than he could otherwise have claimed, but I do not read it in that way. It appears to me to mean nothing more than that the lessee undertakes to pay the costs of the lessor.

But it is said, assuming that the Act applies, and that there is no agreement to take the case out of it, Sched. I., Part II., only provides for remuneration for preparing, settling, and completing the lease and counterpart, and does not interfere with costs of negotiations, which can therefore be charged for separately. If we look at the schedule alone, that argument is forcible. But we must look at rule 2: "The remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, &c., is to be regulated as follows:—(*a*) In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in Part I. of Sched. I. to this order, and to be subject to the regulations therein contained; (*b*) In respect of leases and agreements for leases, of the kinds mentioned in Part II. of Sched. I. of this order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part II. of such Schedule I." The question is, whether negotiations preparatory to the granting of a lease are not business connected with a lease. In my opinion they are, and if so, the charges in respect of them are covered by Part II. of Sched. I., whatever its precise terms may be. This conclusion appears to me to be fortified by rule 2, sub-sect. (*c*), "In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore or in Schedule I. hereto prescribed, but which is not, in fact, completed . . . the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." This shews that if a lease was not executed there still might be business, which could only be in respect of negotiations, and it hence

(1) 25 Ch. D. 301.

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appears that negotiations were intended to be included in business connected with leases. If the lease is not executed, this business is to be paid for according to the old system as modified by Sched. II., if it is executed, the solicitor is paid according to the scale. The Act and Rules were intended to provide for the fair remuneration of solicitors, and in many cases, I believe, tend greatly to their benefit. Having the benefit they must take the burden.

LINDLEY, L.J. :—

I agree that the decision appealed from is right. Perhaps the most difficult question is whether the rules apply at all to pending business; but sect. 7 of the Act satisfies me that they are applicable. I do not regard it as unimportant that the solicitor claimed the benefit of the rules as to part of the business. He elected to have that part of his work paid for under the new rules, and I am not sure that it does not follow from that election that his whole bill must be treated in the same way.

I think that there is nothing in the argument founded on the agreement, it was a mere agreement that the lessee should pay what the lessor was liable to. The solicitor is to be paid by the lessee, and the only question is, how the remuneration is to be calculated. The only difficulty on the rules arises from the words in Sched. I., Part II., "for preparing, settling, and completing lease and counterpart," which at first sight seemed to me to be struck out by the decision. The only way of meeting that difficulty is to fall back on the body of the rules, and when we look at rule 2 (*b*) and (*c*), it is pretty clear what is meant by "business connected with." The expression includes preparatory negotiations. Then again, if we look at the 5th of the "rules applicable to Part II. of Sched. I.," we find that if a lease is granted for a premium the purchase scale applies to the premium. In such a case there can be no doubt that negotiations are included. I agree that the appeal must be dismissed.

FRY, L.J. :—

I am of the same opinion. I think that sect. 7 of the Act declares in substance that the Act shall apply to all bills which

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are taxed while the General Orders are in force. If the Act had not been intended to apply to pending business different language would have been used.

As to the second question, I agree with the other members of the Court. No doubt the Sched. I. is not very easy to construe, but I agree in the conclusion that it was intended to deal with the whole of the business relating to sales and leases. That is the natural import of the first part of rule 2. It is true that in clause (*b*) we find different language, for it speaks of the solicitor "having the conduct of the business." I think that this means of the entire business connected with the lease, and that it ought not to be cut down on the ground that in the schedule the remuneration is expressed to be "for preparing, settling, and completing lease and counterpart." I agree that the appeal must be dismissed.

Solicitors for Appellant: *Soames, Edwards, & Jones.*
Solicitors for Respondent: *Freeman & Bothamley.*

H. C. J.

BRADFORD *v.* YOUNG.

C. A. 1885 *April* 28, 30.

[1883 B. 1099.]

Domicil—Abandonment of Domicil of Choice—Probate—Construction of Will expressed in Terms of Foreign Law.

A Scotchman came to live in *England* and acquired an English domicil. He afterwards went for two years to *France* and returned to *England*, where he soon after died. He left an unsigned will of personal estate, made in 1827, which was drawn by a Scotch lawyer, and contained several technical words of Scotch law. The will was admitted to probate by the English Court. It was held by *Pearson*, J.:—(1), that the grant of the probate was not conclusive that the testator was domiciled in *England*; (2), that the Scotch domicil of the testator had revived, and that he died a domiciled Scotchman; (3), that the will must be construed according to Scotch law; and (4), that upon the true construction of the will the Plaintiff was entitled to the estate:—

Held, by the Court of Appeal, that whether the testator was domiciled in *Scotland* or *England*, and whether the will was to be construed according to English or Scotch law, on the true construction of the will the

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Plaintiff was entitled to the estate; and therefore the question of domicil was immaterial.

But, *semble*, the testator died domiciled in *England*, his residence in *France* not being sufficient evidence of his intention to abandon his English domicil.

Semble, also, the use of some technical Scotch terms in his will did not furnish sufficient indication of the intention of the testator to induce the Court to construe it according to Scotch law.

THIS was an appeal from two orders of Mr. Justice *Pearson* (1).

The question in the action related to be domicil of *Hugh Falconar* and the validity and construction of his will. The facts are given at length in the previous report. They may be stated shortly as follows.

The testator was born in *Scotland* about the year 1771. In 1790 he obtained a commission in the British army and went with his regiment to *India*, where he remained several years. In 1803 he was taken prisoner by the French and was detained in *France* till 1810, when he was liberated and came to *England*.

While in *France* he had two illegitimate children by a French woman, one of whom, named *Jeanne*, or *Jane*, survived him. In 1814 he purchased a lease for thirty-five years of a house and some land at *Hartfield*, in *Sussex*, and in the same year married *Elizabeth Bradford* an English lady. He resided at *Hartfield* till 1819, when he sold the lease of his house and hired the rectory house at *Storrington*, in *Sussex*, where he resided with his wife till 1824. In that year he went to *Boulogne*, taking with him one of his English servants, and leaving at *Storrington* a small quantity of his household furniture. In June, 1826, he returned to *England*, and in October, 1826, went to *Brighton*, where he died suddenly on the 23rd January, 1827.

The testator left a testamentary document, which was drawn by Mr. *Dallas*, a writer to the signet in *Edinburgh*, under his instructions. Mr. *Dallas* sent the draft to the testator at *Brighton* on the 2nd of January, 1827, and the testator on the 13th of January returned it to Mr. *Dallas* with some holograph marginal notes suggesting some alterations in the draft. Mr. *Dallas* returned the draft, altered in accordance with these suggestions, to the testator

(1) 26 Ch. D. 656; 28 Ch. D. 18.

for his execution on the 24th of January, 1827, in ignorance of the fact that he was then dead.

By this document, which contained several technical words of Scotch law, the testator purported to "dispone, assign, convey and make over," to and in favour of certain persons therein named as trustees, the whole of his property upon the trusts therein declared. The final clause of the instrument was as follows: "Lastly, I appoint the whole residue and remainder of my funds and estate to belong and be paid to or secured under the restriction after inserted for the behoof of the said *Jeanne* or *Jane Falconar*, now my only surviving daughter by the said *Marie Anne Maubon*, whom I have formally adopted according to the laws of *France* . . . and whom I hereby name, constitute, and appoint my residuary legatee. And I appoint my said trustees to be the guardians of my said daughter in the care and disposal of the funds devolving on her under this my settlement, with power to them, whether or not my said daughter shall have attained majority or be married at my decease, and I hereby specially enjoin them, to secure the residue of my funds and estate falling to my said daughter so as that the same shall not fall under the right or administration of her husband, or be attachable by his creditors or affectable by his debts or deeds, but be enjoyed by herself during her life, with the fee or remainder to her children according as she shall divide the same among them. And failing of her and her issue [the life-rent of the residue to belong to and be enjoyed by her husband if she shall have left a husband surviving her, and failing my said daughter and her issue, and on the decease of her husband] either before or after my decease, I appoint my said brother *John* for his life-rent use and his lawful children or their issue in fee or remainder, my residuary legatees." The words between brackets were inserted by Mr. *Dallas* in accordance with the testator's suggestion. The testator left surviving him, his wife *Elizabeth*, his daughter *Jeanne*, or *Jane*, two sisters, a brother, *John Falconar*, and four children of his brother.

On the 29th of March, 1828, probate of the testamentary document, as the will of the testator, was granted by the Prerogative Court of *Canterbury* to three of the persons named in it as trustees, notwithstanding the fact that it was not dated and

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had not been signed by the testator. The probate was granted after proof of the document in solemn form, and evidence was adduced as to the facts relating to the domicil of the testator. In the probate the testator was described as of *Brighton*, but it did not appear that the Court pronounced any formal decision on the question of domicil, except so far as it was involved in the grant of probate.

Jane Falconar died on the 10th of February, 1882, without having been married, and having appointed *W. H. Bradford* her sole executor.

The action was brought by *W. H. Bradford* against the trustees of the will and the persons claiming under *John Falconar*.

On the 29th of April, 1884, Mr. Justice *Pearson* decided:—(1), that the probate of the will by an English Court was not conclusive that the testator was a domiciled Englishman; (2), that the English domicil of the testator had been abandoned, and that his domicil of origin had revived, and that he died a domiciled Scotchman; and (3), that the will, being expressed in Scotch terms, must be construed as a Scotch will. His Lordship therefore directed a case to be submitted to the Court of Session in *Scotland* under the 22 & 23 Vict. c. 63, as to the construction of the residuary clause in the will. On the 19th of July, 1884, the Court of Session returned their opinion to the effect that the writing, being unsigned, was inoperative by the law of *Scotland*; but that if it had been signed, so as to give validity to its contents, they should have been of opinion, taking it as a Scotch instrument, that *Jane Falconar*, on surviving the testator, took an absolute interest in the property as residuary legatee, subject only to the constitution of a trust in circumstances that did not occur; and that on her death without issue the property passed to her legal representatives, the descendants of *John Falconar* taking nothing.

On the 8th of August, 1884, the action came on again for further consideration before Mr. Justice *Pearson*, when his Lordship, in accordance with the opinion of the Scotch Judges, ordered that after payment of costs the funds in Court should be transferred to the Plaintiff, as the executor of *Jane Falconar*.

The Defendants claiming under *John Falconar* appealed from

the two orders of the 29th of April and the 8th of August, 1884.

Everitt, Q.C., and *Kaye*, for the grandchildren of *John Falconar*:—

We contend, first, that the question of the testator's domicil is concluded by the grant of the English probate: *Bloxam* v. *Favre* (1); *Bouchier* v. *Taylor* (2); *Barrs* v. *Jackson* (3); *Whicker* v. *Hume* (4). Secondly, that if the English probate is not conclusive the evidence proves that the testator had never lost his acquired English domicil. Thirdly, that the document, though containing some Scotch expressions, ought to be construed as an English will: *Anstruther* v. *Chalmer* (5); *Reynolds* v. *Kortright* (6); *Studd* v. *Cook* (7). Fourthly, that if the document be construed as an English will, the gift to *Jane Falconar* had failed and the children and grandchildren of *John Falconar* took the estate.

Cookson, Q.C., and *Wiglesworth*, for the representatives of a child of *John Falconar*.

[COTTON, L.J.:—We do not desire to hear any argument at present on behalf of the Respondents as to the domicil of the testator. We wish to hear them on the construction of the instrument, assuming that it is to be construed as an English will.]

Cozens-Hardy, Q.C., and *A. Young*, for the Plaintiff:—

Assuming that the domicil was English, and that the will must be construed as an English will, which however we do not concede, we still contend that *Jane Falconar* took an absolute interest in the event which happened, and therefore that the appeal cannot succeed. There is an absolute gift to her, and there is nothing to take it away from her if she did not marry.

Everitt, in reply, as to the construction of the will, cited *Seawin* v. *Watson* (8); *Reid* v. *Reid* (9); *Gompertz* v. *Gompertz* (10).

(1) 9 P. D. 130.
(2) 4 Bro. P. C. 708.
(3) 1 Ph. 582.
(4) 7 H. L. C. 124.
(5) 2 Sim. 1.
(6) 18 Beav. 417.
(7) 8 App. Cas. 577.
(8) 10 Beav. 200.
(9) 25 Ibid. 469.
(10) 2 Ph. 107.

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COTTON, L.J., addressing Mr. *Cozens-Hardy*:—

The present opinion of the Court is that the testator's domicil was English. If the Court is in your favour on the construction of the will, do you wish to argue the question of domicil?

Cozens-Hardy:—No. The domicil will in that case be immaterial.

COTTON, L.J.:—

This is an appeal from two orders of Mr. Justice *Pearson*. Questions have been raised as to the domicil of the testator, and as to the validity of the probate of the will in *England*. But the rights of the parties depend upon the true construction of the will. If it is a Scotch instrument, it must be construed according to the interpretation put upon it by the Scotch Court—if it is an English instrument, it must be construed according to our opinion of its meaning. Mr. Justice *Pearson*, notwithstanding the fact that the document, if Scotch, was inoperative, declared that the domicil of the testator was Scotch, but he held that the construction must be decided according to the Scotch law, and he sent the will to *Scotland* for the opinion of the Scotch Court. If we had come to the conclusion that the domicil was Scotch, I should have thought that, as the will contained Scotch terms, the construction ought to be decided by Scotch law. But I think that the conclusion of the learned Judge that the domicil was Scotch was erroneous. The testator's domicil was originally Scotch; he went to *India* in the British army and was taken prisoner, and remained some time in *France*. Then he came to *England*, where he married, and, in the opinion of Mr. Justice *Pearson*, from which I do not dissent, he acquired an English domicil. After some years he sold the lease of his house at *Hartfield*, and took another house at *Storrington*, and lived there for a time. In 1824 he left his residence there and went to *France* for about two years. Mr. Justice *Pearson* held that the moment he went on board the ship he abandoned his English domicil. Why should that be so? If he had gone with the intention of living permanently in *France*, that would have shewn an intention to abandon his English domicil. But he only stayed two years in *France*, he took with him an English

footman who returned with him to *England*, and he took some part only of his furniture to *France*, leaving the rest at *Storrington*. It appears to me that his conduct indicated an intention not to abandon his English domicil. All the evidence which was brought before the Ecclesiastical Court when probate was granted, tends to shew that the testator did not intend to reside permanently in *France*, but only for a limited period. Then after two years he came back to *England* and resided for a short time at *Brighton*, where he died. His residence at *Brighton* is not relied upon for acquiring an English domicil, but the question is whether having previously acquired an English domicil, he abandoned that domicil. I think he had not done so. If he had abandoned his domicil of choice, his domicil of origin would have revived. But I am of opinion this was not the case, and that his domicil at the time of his death was English.

That being so, we come to the construction of this, as of any other English will. There is nothing to shew that the testator intended it to be construed according to the law of *Scotland*. It is true there are some words used which are more frequently used in Scotch documents than in English, but this is not a document dealing with technical limitations of real estate, but only with personal estate, the law of which depends upon the domicil of the testator. We are referred to certain words of limitation; but they do not seem to me to have much bearing on this case. Without deciding that in wills dealing with real estate there may not be cases in which the Court may be driven by the expressed intention of the testator to construe them according to Scotch law, I am of opinion that here that question does not arise; there is no indication of intention that the will should be construed according to Scotch law. What are the limitations of this will? [His Lordship read and considered the residuary clause in the will, and said that as *Jane Falconar* did not marry, the event had not occurred on which the residue was given over to *John Falconar*; consequently the original absolute gift to *Jane* prevailed, and the Plaintiff must be declared entitled to the estate.]

LINDLEY, L.J.:—

I am of the same opinion. The testator came to *England* in 1814; he settled in his house at *Hartfield*, and, with the exception

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of two years during which he resided in *France*, he had been living in *England*, ever since. I can see no evidence of intention to change his domicil of choice. On the contrary, the evidence is very strong that he acquired and never lost an English domicil. This must have been the view of the Ecclesiastical Court, when it allowed the will to be proved, whether the probate is strictly conclusive as to the domicil or not. Then, the domicil being English, the question arises whether the will must be construed according to English or Scotch law. *Primâ facie*, being an English will it must be construed by English law, but it was drawn by a Scotch lawyer, and certain Scotch terms were used in it, and it was contended that for that reason it ought to be construed as a Scotch document. I think this is a question of intention, and I see no indication of such an intention here. The will is perfectly intelligible to an Englishman. A few words might have to be explained, but this is not sufficient to induce us to depart from the general rule.

That brings us to the question what the will really means. I have thought from the first that the Scotch Judges adopted the correct view. Mr. Justice *Pearson* concurred with them, and Lord Justice *Cotton* has expressed the same opinion, and I agree with them.

The testator's object was to provide for his daughter and her children and husband if she had any; and if not, then for his daughter alone. I think the absolute gift to her has not been cut down, the event on which the residue was given to *John* not having happened.

FRY, L.J. :—

I concur in the conclusion to which the other Lords Justices have arrived. I agree with Mr. Justice *Pearson* that the testator acquired an English domicil of choice. The only point on which I differ from him is the effect of his residence in *France*. Considering all the evidence, I have come to the conclusion that he did not abandon his domicil of choice, but that at his death his domicil was English.

Then, with respect to the will, the circumstances are very extraordinary. We have to construe a document which was never signed by the testator, and was never seen by him in its present

form. But we must apply the same rules to its interpretation as if it had been seen and approved and signed by him. The first question is whether the will should be construed according to Scotch law. If the testator had said so that would have bound us, but what is there in the will from which that intention can be discovered? Only this, that there are some words used which are familiar to Scotch law and not to English. But these words are very few. The will looks like the production of a Scotchman trying to write like an Englishman. In my opinion, therefore, the will must be construed according to English law.

[His Lordship then considered the residuary gift in the will, and said that he had come to the conclusion that the original gift to the daughter remained if she did not marry, and therefore the event had not happened on which the residue was given to the testator's brother.]

COTTON, L.J.:—

The Appellants have failed, and must pay the costs of the appeal. The question of domicil was immaterial.

Solicitors: *Walker, Martineau & Co.; A. Howard; Markby, Stewart, & Co.*

M. W.

C. A. 1885 May 1.

In re DAMES AND WOOD.

Vendor and Purchaser—Conditions of Sale—Right to rescind.

Land was contracted to be sold under a condition that "if the purchaser should take any objection or make any requisition" which the vendor was "unable or unwilling to remove or comply with," the vendor might rescind the contract.

The purchasers made requisitions, and the vendor, for reasons stated, declined to comply with several of them. The purchasers insisted, and the vendor served them with notice that "being unable or unwilling to remove or comply with" the requisitions, he rescinded the contract. The purchasers in reply denied the vendor's right to rescind, withdrew their requisitions, and stated that they were willing to complete:—

Held (affirming the judgment of *Bacon*, V.C.), that the contract had been duly rescinded.

THIS was an appeal from a judgment of Vice-Chancellor *Bacon*, upon a summons taken out under the *Vendor and Purchaser Act*, 1874, by the trustees of the *Jews Infant School, Commercial Street*, for a declaration that they were entitled to have conveyed to them by the vendor and other necessary parties certain freehold hereditaments, No. 84, *Leman Street*, and No. 18, *Tenter Street, East Whitechapel*.

The facts of the case are fully stated in the report of the hearing in the Court below (1), and being also given in the judgment of Lord Justice *Cotton*, the following short statement of the nature of the case will be sufficient for the purpose of the present report:—

The property was contracted to be sold by *Richard Dames* to *Henry Wood*, who was the agent of the trustees, under a condition that "if the purchaser should take any objection or make any requisition which the vendor was unable or unwilling to remove or comply with," the vendor might by notice in writing rescind the contract.

The vendor, for reasons stated, declined to comply with several of the purchasers' requisitions. The purchasers insisted, and the vendor served them with notice that "being unable or unwilling to remove or comply with" the requisitions, he thereby, in

(1) 27 Ch. D. 172.

exercise of the power given by the condition, rescinded the contract, and offered to repay the deposit. The purchasers then wrote to say that they denied the vendor's right to rescind, but would withdraw the requisitions, and were willing to complete. A draft conveyance was afterwards sent by the purchasers, of which the vendor took no notice, and the purchasers then took out this summons.

It was held by Vice-Chancellor *Bacon* that the vendor having expressed his inability or unwillingness, was under the condition entitled to rescind the contract as he had done, and from this decision the purchasers now appealed.

Everitt, Q.C., and *Solomon*, for the Appellants:—

In order to entitle the vendor to avail himself of the condition to rescind and annul the contract, he must shew either absolute inability to remove or comply with some objection or requisition made by the purchasers, or reasonable unwillingness to do so. He must, moreover, furnish the purchasers with all the information in his possession relating to the title, and must also give the purchasers an opportunity of withdrawing their objections or requisitions before he rescinds, for a vendor ought not to annul the contract under a condition of this sort on the ground of insistence, unless the requisition is insisted upon with knowledge on the part of the person by whom it was made that rescission would be the consequence of insistence. Instead of this the vendor has annulled the contract *brevi manu* in an arbitrary manner: *Greaves* v. *Wilson* (1); *Turpin* v. *Chambers* (2); *Duddell* v. *Simpson* (3).

[FRY, L.J.:—You say there are, as it were, three conditions precedent, first, the communication of unwillingness with some reasonable ground for it; secondly, communication of all the information in the vendor's power; and, thirdly, a *locus pœnitentiæ* for the purchasers, *i.e.*, a reasonable time for withdrawing their objections.]

That is so, and none of these are to be found in this case. There was, moreover, no insistence on our part, but a mere reser-

(1) 25 Beav. 290, 296. (2) 29 Beav. 104.
(3) Law Rep. 2 Ch. 102, 107.

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vation of our rights *ex abundanti cautelâ*, while the vendor on his part insisted on rescission even after our withdrawal: *Gray* v. *Fowler* (1). It is true that the words in this condition are not in case the purchaser shall "insist," as in *Greaves* v. *Wilson* (2), or "persist," as in *Mawson* v. *Fletcher* (3); but are in case the purchaser shall "take" any objection or "make" any requisition. The principle is, nevertheless, the same: *Bowman* v. *Hyland* (4). A reasonable construction must be put upon the condition, and it could not entitle the vendor arbitrarily to put an end to the contract the moment a requisition was made.

[They also referred to *In re Jackson and Oakshott* (5).]

Ince, Q.C., and *Russell Roberts*, for the Respondent, were not called upon.

COTTON, L.J.:—

This is an appeal from the judgment of Vice-Chancellor *Bacon* upon a summons taken out under the *Vendor and Purchaser Act*, whereby his Lordship decided that the purchasers were not entitled to insist on their contract, because, having regard to what passed between the parties, the vendor had properly exercised a power of rescinding the contract, which had been given to him by one of the conditions of sale. The condition in question (which was the 11th) was, so far as material, as follows: "If the purchaser shall take any objection or make any requisition as to the title, evidence, or commencement of title, conveyance, or otherwise which the vendor is unable or unwilling to comply with, the vendor may by notice in writing delivered to the purchaser or his solicitor, and, notwithstanding any intermediate negotiation, rescind the contract for sale." Now it is said on behalf of the purchasers that no *locus pœnitentiæ* had been given to them. That is to say, that after the vendor's answers to requisitions had been sent to the purchasers, and their observations on those answers had been sent to the vendor, and some or all of them had been discussed, the purchasers ought to have been told

(1) Law Rep. 8 Ex. 249, 264.
(2) 25 Beav. 290, 296.
(3) Law Rep. 6 Ch. 91, 94.
(4) 8 Ch. D. 588.
(5) 14 Ch. D. 851.

by the vendor that unless they withdrew their requisitions within a certain time the contract would be rescinded, so that they might have the opportunity of considering whether they would withdraw the requisitions or not, and that the contract could not be determined by a notice without some reasonable time being allowed for this purpose. But that point is disposed of by *Turner*, L.J., in *Duddell* v. *Simpson* (1), for at page 107 the Lord Justice expresses himself thus:—"Another ground relied upon was, that the notice ought to have given time to the purchaser to determine whether he would or would not waive the objection which he had taken, and that the contract could not be well determined by a notice without such time being allowed. But I do not find any such stipulation in the conditions of sale. To lay down a rule that the vendor must give notice before he determined the contract, would be, in effect, to introduce into the condition a new term, that the vendor may annul the contract by a notice in writing, to be given to the purchaser, allowing so many days to the purchaser to determine whether he will waive the requisition." Then we must consider also what was said by Lord *Cairns* in that case. He laid down that, upon the construction of the condition in that case there were four matters which must concur before the contract could be rescinded. "First, there must be an objection to the title; secondly, there must be an inability or unwillingness on the part of the vendor to remove that objection; thirdly, there must be a communication to the purchaser of the existence of this inability or unwillingness; and, fourthly, there must be an insisting by the purchaser on his objection, notwithstanding this communication."

Now these observations were made with reference to a condition which differed from the condition in the present case, inasmuch as it contained the words "insist on;" and it may be that the observation merely applied to that particular condition; but independently of any difference between the two conditions I cannot see that any of the four matters, the concurrence of which Lord *Cairns* said was necessary, are wanting here.

However, before I go into the consideration of this case, I will

(1) Law Rep. 2 Ch. 102.

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just refer to an observation in the course of the judgment of *James*, L.J., in *Mawson* v. *Fletcher* (1), which was this. "It is true that the vendors could not make such a contract, and avail themselves arbitrarily of this condition to put an end to it; but in this case it is impossible not to see that they would be involved in very considerable trouble and expense by such an inquiry as would be necessary." So that on looking at the requisitions in that case, his Lordship said that they were of such a character as under ordinary circumstances would involve considerable trouble and expense in answering, and he therefore said there was no reason for suggesting that the exercise of the power of rescission was unreasonable or arbitrary, and that no objection on that score could prevail. There may be a doubt whether it is quite reasonable to say, when parties have entered into a contract, that the Court must consider whether it is unreasonable or not; but the cases do certainly lay down this, that a vendor cannot avail himself of such a condition arbitrarily, or unless he shews some reasonable ground for his unwillingness to answer the requisitions.

Now, let us see what are the facts in the present case. Looking at the requisitions, and at the replies or observations on the answers, it appears to me that the vendor here has certainly stated his unwillingness to comply with some of those requisitions, and that the purchasers have insisted on the requisitions; and, having regard to the nature of the requisitions, I come to the conclusion that the unwillingness of the vendor was for a very good reason; because a good many of the requisitions would have involved considerable labour and expense, and a good many of them shew that they were not taken very reasonably, or for the real purpose of clearing the title from substantial objections.

Now take the second requisition, which after stating a great deal about the title, continues: "The vendor is accordingly required to shew that the £18,000 has been duly set apart"—that was a legacy given by the will—"and that all the debts of *C. R. Dames* have been paid." So that the vendor was thus required, not only to shew that the £18,000 was duly set apart, but that all the debts of *C. R. Dames* had been paid. Now *C. R. Dames* died many years ago, *i.e.* in 1861, and I think there is very good reason for the vendor not being willing to shew that all these

(1) Law Rep. 6 Ch. 94.

debts were paid. The answer was, that the vendor entirely disputed the correctness of the statement about the title, and that any debts owing by the testator must "be statute-barred by this time." This answer was given some time in 1883, and therefore the debts were then of considerable age. The answer concluded thus: "We must decline to comply with the requisition." If that is not stating an unwillingness to comply with that requisition, I do not understand language or the inferences which ought to be drawn therefrom; and I think that in that instance there was very good reason for unwillingness, if the requisition was insisted on. The answer is: "This reply is unsatisfactory, and the purchasers reserve their right to insist upon the requisition being answered."

It is said that really must be taken as not insisting on it. If they had said, "Well we do not insist on it," that I could understand; but the vendor is told: "That requisition is made and taken by us, we do not waive it, and it is one that we have a right to have answered."

Then there is the 5th: "Has the vendor evidence that the debts of *George Dames* have been paid." I do not think it quite appears when he died, but the answer is, "The vendor has no evidence of this." Then the observation in reply is, "Evidence must be furnished." We must take it, therefore, that the vendor has not got the evidence in his possession, and yet the purchasers are insisting on their requisition that the vendor must shew it. Then comes the 9th: "The vendor should abstract and prove the statements contained in the deed of the 7th of June, 1880, and for this purpose should abstract and produce the probate, or a probate copy of such part of the will of *E. S. Bowerbank* as related to the legacy in question, and should abstract and produce the settlement of the 12th of July, 1866, and the deed of conveyance of the *Elms*." The answer is, "We do not see how this affects the property sold, and must decline to comply with this requisition." The reply is, "These statements are brought upon the title, and consequently the vendor must prove them." Not knowing much about these deeds, or about the will, I cannot say that it is unreasonable to be unwilling to answer this requisition.

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Now to take the 10th. The property put up was the premises known as 84, *Leman Street,* with a coloured plan. That plan shews that there is a building facing *Tenter Street,* and the requisition is, "that the deeds do not shew any title at all to *Tenter Street.*" The title to *Tenter Street* had not been abstracted, and the answer was, "No. 18, *Tenter Street East* and No. 84, *Leman Street* are parts of the same building and the title the same. There are no separate deeds relating to either property." Now the purchasers might have said, "Let us have a declaration that it is so," but instead of that they insisted on the title being shewn to No. 18, when it was really part of 84, for they replied, "This answer is most unsatisfactory and cannot be accepted. There is nothing upon the deeds already produced shewing any title to 18 *Tenter Street.* A title must be shewn." That is really insisting on the requisition.

Neither was the 13th requisition a reasonable requisition. It is with reference to thirteen windows mentioned in the particulars as overlooking the vendor's property, which by an arrangement with the owners of the property on which the building containing them stood, were to be closed whenever the vendor required them to be so, and the requisition is: "The vendor should prove that the right to use the thirteen windows was granted to the adjoining owners by the owners of the property sold, and for that purpose should shew that the persons to whom the right was granted were in fact the adjoining owners, and should prove that the notice has been duly served upon the present adjoining owners, and the windows bricked up, and that the present adjoining owners are desirous of making arrangements with the purchasers at the present sale to acquire the right of again opening the windows." That is to say, the vendor is required to shew that the persons with whom he made the arrangement were in fact the owners of the adjoining land. What is the answer to that? "The windows having been already bricked up prior to the sale, further compliance to this requisition would seem to be unnecessary." Well, I think so. But the reply is this: "This is not sufficient; the bricking up of the windows may only be for temporary purposes. The purchasers insist upon the requisition." I think the vendor cannot be considered in this instance again

to have no reasonable ground for his unwillingness to give any further answer.

Now dealing with these requisitions and the answers and the replies to the answers, three things are to be noticed. First, that these requisitions were made, and as regards several of them it was reasonable for the vendor to say that it would involve him in considerable difficulty and expense to answer them, and that therefore he was unwilling to do so. Secondly, that there was an insisting by the purchasers upon their requisitions notwithstanding the vendor's answers. Thirdly, that the purchasers not having waived their requisitions the vendor exercised his right to rescind.

Now let us look at this 11th condition. It has been said that if under such a condition a vendor is entitled to insist on rescission of the contract, he might do so in a most unreasonable way; but if he rescinded the contract in an unreasonable way; that is to say, if we thought on the circumstances of the case his rescission was arbitrary, then he would not, upon the principle acted upon in the cases, be held entitled to put an end to the contract. It has been said, again, that the words "take" any objection and "make" any requisition contained in the condition enable the vendor to rescind, without giving the purchasers any *locus pœnitentiæ*, at once as soon as any objection or requisition was taken or made, without giving any answer. But our decision, affirming that of the Vice-Chancellor, would not have that effect. The purchasers have not only taken objections, but, notwithstanding the answers given by the vendor to them, and the statement that he was unwilling to answer further, they have taken upon themselves to say they must have something more. That is to say, they have continued to take and to make objections and requisitions notwithstanding the reasonable unwillingness expressed by the vendor. In my opinion the vendor was entitled to exercise, and has in reason exercised, the right to rescind given him by the conditions; and I think the decision of the Vice-Chancellor is right.

LINDLEY, L.J.:—

I am of the same opinion. This was a contract for sale entered into on the 7th of August, 1883, and it was part of the bargain

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that the vendor, if he was unable or unwilling to remove any of the objections referred to, should be at liberty to rescind the contract. The power so reserved to the vendor must be considered with reference to the object with which it was so inserted, an object perfectly well known to everybody who has any experience in real property transactions. The vendor cannot say, "I will not complete, and will throw up the contract for sale;" he must exercise the power *bonâ fide* for the purpose for which it was made part of the contract. As long as he does that, I do not see how we can restrain him from the exercise of the power.

The requisitions made in this case are some of them extremely onerous. Those about proof of debts being paid which were incurred nobody knows how long ago, and two or three others, shew it conclusively. Consequently the vendor says, "I must decline to answer," and if the purchasers had dropped their requisitions, well and good; but they did not do so, they insisted on them, and what was the vendor to do? It appears to me there was ample ground for the exercise of the power, and he exercised it. Another point is this: Has the vendor so conducted himself by negotiations and correspondence as to preclude himself from the right of exercising the power? For that purpose one must look into the letters; but I cannot see that he has said or done a single thing to mislead the purchaser. It appears to me that he acted with perfect *bona fides* throughout, and that the exercise by him of the power was warranted by the true construction of it, and was *bonâ fide*, having regard to the purpose for which that power was inserted. I think the appeal ought to be dismissed.

FRY, L.J.:—

I am entirely of the same opinion. The contract in the present case reserved a power to the vendor to rescind, if the purchaser should take any objection or make any requisition as to evidence of title which the vendor was unable or unwilling to remove.

Now two points have been referred to of some nicety, neither of which does it seem to me necessary to determine in the present case. In the first place it has been said that it is impossible that the vendor should be entitled to rescind simply because the purchaser has taken an objection. That may or may not be a sound observation. In the present case not only have th

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purchasers taken the objection, but they have insisted on the objection, and even if the argument is correct the present case is not governed by it.

The other point which has been referred to is this. It has been said that the burden of proving that the power is exercised on reasonable grounds rests on the vendor who exercises it. That point, as it appears to me, it is unnecessary to determine in the present case. On the evidence before us, I have come to the same conclusion as my Brother Judges, that in this case the vendor has shewn he had reasonable ground for the exercise of the power. I think, therefore, that the decision of the learned Vice-Chancellor is perfectly correct; and this appeal must be dismissed with costs.

Solicitors for Applicant: *Emanuel & Simmonds.*
Solicitors for Respondent: *Brook & Chapman.*

W. W. K.

In re BOUCH. SPROULE *v.* BOUCH.

C. A. 1884 KAY, J. *March* 18. C. A. 1885 *Feb.* 20, 21; *March* 18.

[1883 B. 5910.]

Bonus Dividend—Capital or Income—Tenant for Life and Remainderman.

A testator died in 1876 having bequeathed his residuary personal estate to his executor *T. B.* in trust for the testator's wife for life, and after her death to *T. B.* Part of the residuary estate consisted of 600 shares in a company whose directors had power, before recommending a dividend, to set apart out of the profits such sum as they thought proper as a reserved fund, for meeting contingencies, equalizing dividends, or repairing or maintaining the works. The shares were £10 shares on which £7 10*s.* per share had been paid up. In 1880 the reserved fund was £100,000, which had been made up in the testator's lifetime, and there was also an "undivided profit" fund of £36,070, more than half of which arose from profits earned in his lifetime. In September, 1880, the directors proposed to add to the "undivided profit" fund £7246, and recommended that the £100,000, and £38,000 out of the undivided profit fund, should be distributed as a "bonus dividend" of £2 10*s.* per share, and that there should be created new £10 shares amounting in number to one-third of the original shares, so that one new share might be allotted to each shareholder for every three original shares which he held, £7 10*s.* per share to be paid on allotment, which £7 10*s.* the bonus would enable him to pay.

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At a general meeting these recommendations were adopted, and special resolutions were passed, authorizing the directors, with the sanction of a general meeting, to declare a bonus out of the reserved and undivided profit fund, and providing for the issue and allotment of new shares. These resolutions were confirmed at a subsequent meeting, at which an ordinary resolution was passed for paying the bonus of £2 10*s.* per share. The warrant for the bonus had at its foot a memorandum to be signed by the shareholder directing the registrar of the company to apply the bonus in payment of the call. *T. B.* accepted the 200 new shares allotted to him, and signed the memorandum, and the new shares were registered in his name. After the death of the testator's wife in 1883, the question was raised whether the bonus of 1880 and the new shares belonged to the widow as tenant for life, or to *T. B.* as entitled to the capital of the testator's estate at her death :—

Held, by *Kay*, J., that they were capital and belonged to *T. B.*

Held, on appeal, that there is no rule that where a sum, whether called bonus or dividend, is distributed by a company among its shareholders, it must, if it is paid out of the accumulated profits of past years, be treated between tenant for life and remainderman as capital. In most, if not all, cases, the inquiry when the profits out of which it is paid were earned is immaterial, the question being whether the company, having the power of distributing its profits as dividend, or of converting them into capital, has taken the former or the latter course.

Held, that in the present case the company had not, by setting aside profits to a reserved fund applicable for purposes several of which were not such as ought to be satisfied out of capital, or to an undivided profits fund, made them capital,—that the distribution of the bonus was not conditional on the shareholders accepting the new shares, and that it was not converted into capital by the offer of the new shares, the shareholders not being bound to apply it in taking them, that it must therefore be treated as income belonging to the tenant for life, and that the new shares acquired by means of it belonged to her estate.

WILLIAM BOUCH, by will dated the 12th of January, 1876, appointed Sir *T. Bouch* his executor, and bequeathed to him his residuary personal estate, in trust to convert it into money, or, with the consent of the testator's wife, *Jane Bouch*, to allow all or any part of it to remain unconverted, and to stand possessed of the proceeds of the conversion upon trust to invest the same in such securities as the executor and the wife should jointly agree upon, and to permit the wife to receive the interest, dividends and income of the said personal estate and moneys and the investments thereof during her life, and subject to the aforesaid trust the testator bequeathed his residuary personal estate to Sir *T. Bouch* absolutely.

The testator died on the 19th of January, 1876, and his will was proved by Sir *T. Bouch*. Part of his residuary personal estate consisted of 600 shares of £10 each in the *Consett Iron Company, Limited*, on which £7 10*s*. per share had been paid. These shares remained unconverted with the consent of the widow, and she received the dividends during her life.

The *Consett Iron Company* was incorporated in 1864 as a company limited by shares, with a nominal capital of £400,000 divided into £10 shares.

The articles of association contained the following clauses:—

"(5.) The directors may fix the amount of deposit to be paid on the allotment of shares. (30.) The company may by a special resolution from time to time increase the capital of the company by the creation of new shares of such an amount as the company may by such special resolution determine. (31.) Any such new shares may be issued either with or without special privileges and priorities over the original shares, and with such an amount credited as paid up thereon as the company may by such special resolution determine, and the capital represented by such new shares shall be considered as part of the general capital of the company, and shall be subject to the same provisions in all respects as if it had been part of the original capital, except so far as is otherwise provided by the special resolution authorizing the raising of the same. (32.) Upon any increase of capital the new shares to be issued in respect thereof shall (subject to any directions to the contrary that may be given by the meeting sanctioning the increase of capital) be allotted *pro ratâ* among the then existing members according to the number of shares for which they may then be registered, and upon such terms as may be prescribed by the resolution authorizing such increase, but if no such terms shall be prescribed, then upon such terms as the directors with the sanction of a general meeting may think fit. If any member shall not testify his acceptance of his allotment in the form, within the time, and upon the terms, appointed and prescribed, such allotment shall be deemed to be cancelled, and the shares thereby allotted forfeited to the use of the company, and the directors may with the sanction of a general meeting allot or otherwise dispose of such shares as they think fit."

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(108) gave power to an ordinary meeting to declare a dividend. (109.) "The directors may before recommending any dividend set aside out of the profits of the company such sum as they think proper as a reserved fund, for meeting contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof, and the directors may invest the same so set apart as a reserved fund upon such securities or in such manner as they may think proper."

All the original shares in the company were allotted, and £7 10*s.* per share paid on them, and in 1866 the capital was increased by £60,000 divided into £10 shares, which in the course of 1867 were all taken, and £7 10*s.* per share paid thereon.

Under the powers contained in the articles the directors from time to time carried large sums out of the profits to the credit of a fund which until 1874 was called the Reserve or Undivided Profit Fund. By a special resolution in September, 1872, the directors were authorized to increase the capital to £552,000 by the creation of 9200 new £10 shares, and to credit thereon from the then undivided profit fund £7 10*s.* per share, and to allot such new shares among the members in proportion to the shares held by them. These new shares were all allotted accordingly.

In the accounts for the year beginning the 30th of June, 1874, there stood to the credit of a "reserve fund" £100,000 made up of undivided profits of previous years, and to the credit of another fund styled "undivided profit" £6203 12*s.* In September, 1880, the £100,000 was still standing to the credit of the reserve fund, and £36,070 1*s.* 8*d.* to the credit of the "undivided profit" fund. Of this latter sum £18,174 4*s.* 1*d.* represented the undivided profit which had accumulated at the 30th of June, 1875, and £6374 6*s.* 8*d.* represented the undivided profit for the year ending the 30th of June, 1876, in which year the testator died. The £18,174 4*s.* 1*d.* was set apart during the life of the testator, the £6374 6*s.* 8*d.* after his death. The proportion thereof for the fraction of a year preceding his death was about £3545.

In August, 1880, the directors made a report in which they recommended the payment of such dividend as therein mentioned, and the carrying over an undivided profit of £7246 4*s.* 5*d.*, thus

raising the "undivided profit fund" to £43,316 6*s.* 1*d.*, and stated that they felt that the time had come when they might safely recommend some permanent appropriation of the £100,000 standing to credit of reserve fund, and of a considerable portion of the undivided profit fund. They then went on to say: "They therefore propose that the reserve fund £100,000, and £38,000 out of the £43,316 6*s.* 1*d.* undivided profit, making together £138,000, shall be distributed as a bonus dividend of £2 10*s.* per share, equalling £7 10*s.* in respect of every three existing shares. But as the company's operations render it desirable to raise an equal amount on capital account, your directors propose that there be created 18,400 new shares of £10 each, with £7 10*s.* per share payable concurrently with the payment of the bonus dividend. This would allow of one new share being allotted in respect of every three existing shares, and the bonus dividend would pay the £7 10*s.* on each such new share." They went on to recommend that the bonus dividend and call should be payable on the 30th of September, the members registered on the 25th of September being treated as those entitled to the dividend and to the allotment of new shares; that the new shares should take dividend from the 1st of July, 1880, so as to be on an equal footing with the present shares, except as to the dividend about to be declared. "Every member of the company on the 25th of September would consequently receive one new £10 share in respect of every three shares he then holds, such new share having like the existing shares £7 10*s.* paid thereon, and leaving £2 10*s.* uncalled."

This report was adopted by the general meeting on the 4th of September, 1880, and the following special resolutions were passed: 1. That there should be added to the articles after clause 109 the following clause: "The directors may from time to time, with the sanction of the company in general meeting, declare a bonus to be paid to the members in proportion to their shares out of the reserve fund or out of any other accumulated profits for the time being of the company." 2. "That the capital of the company be increased by the sum of £184,000 divided into 18,400 new shares of £10 each." 3. "That the directors be authorized to allot such new shares *pro ratâ* among the existing

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members according to the number of shares for which they may on the 25th of September, 1880, be registered, in the proportion of one new share for every three existing shares, or as near thereto as may be." 4. "That the shares so allotted shall be allotted on the terms that £7 10*s.* per share be paid on allotment, and the remaining £2 10*s.* per share by such amounts and at such times as the directors shall determine."

At a meeting on the 25th of September, 1880, the above special resolutions were confirmed, and an ordinary resolution was passed: "That this meeting sanctions a bonus of £2 10*s.* per share to be paid out of the £100,000 now standing to the credit of the reserve fund, and out of £38,000 part of the £43,316 6*s.* 1*d.* undivided profit now in hand."

The 600 shares belonging to the testator stood on the 25th of September, 1880, registered in the name of Sir *T. Bouch.* On that day the registrar of the company sent to him a letter: "I am instructed to inform you that in accordance with the special resolutions passed &c., the directors have in respect of the 600 shares now registered in your name in the company's books allotted you 200 new shares of £10 each, subject to the sum of £7 10*s.* per share being paid up thereon on or before the 30th inst., and I inclose you a bonus dividend warrant payable on that date for £1500, which you will be good enough to sign and return to me by Thursday next, when the amount will be applied in payment of £7 10*s.* per share on your above named new shares." Similar letters, accompanied by bonus dividend warrants, were sent to the other shareholders.

The warrant was in the following form:—

"*Consett Iron Company Limited.*

"Bonus dividend warrant of £2 10*s.* per share, payable on the 30th of September, 1880, to the members registered in the company's books on the 25th of September, 1880.

"No. 102.

"Name of member: *Thomas Bouch*, Esq.

"Number of shares: 600.

"Amount of bonus dividend: £1500.

"*William Cockburn*, Registrar.

"I hereby authorize and request you to apply the above amount in payment of the call of £7 10*s.* per share on the 200 new shares that have been allotted to me pursuant to the special resolutions passed &c.

"Signature of member, ."

At this time the shares of the company were at about £21 premium. After the allotment they fell to about £14 premium.

Sir T. Bouch accepted the shares, and returned the warrant to the registrar, after signing the memorandum at its foot. The 200 shares were thereupon registered in his name with £7 10*s.* credited on each share.

The £100,000 applied in payment of the £7 10*s.* per share on the new shares, represented profits made before the death of the testator. Of the £38,000 similarly applied, £18,174 4*s.* 1*d.*, was set apart as undivided profit before his death. £6,374 6*s.* 8*d.* was set apart shortly after his death, but the proportion of it attributable to the fraction of the current year before his death was about £3,545, as appears above.

Sir *T. Bouch* died in October, 1880, and the Defendants were his executors. The testator's widow died in 1883, and the Plaintiff was her executor. The widow received the dividends on the 200 new shares during her life. The questions submitted for the opinion of the Court by special case were, whether under the above circumstances the £2 10*s.* bonus paid in 1880 was income, or whether all, or any and what part, was capital, and whether the Plaintiff was entitled to payment thereof from the estate of Sir *T. Bouch*, and whether the Plaintiff was entitled to the 200 new shares, or any and what interest therein.

The case came on before Mr. Justice *Kay*, on March 18th, 1884.

Robinson, Q.C., and *H. Burton Buckley*, for the Plaintiff:—

At the time these moneys were divided by the directors of the company amongst their shareholders, they represented income, and the moneys which made up the bonus in this case were income of the estate of *William Bouch*, to which the tenant for life under his will was entitled.

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[Kay, J., referred to *Straker* v. *Wilson* (1) and *Lindley* on Partnership (2).]

In this case the directors had no such power as in *Straker* v. *Wilson*. They had no power to capitalise the profits of the company. This is recognised by the form of the resolution they passed, and the form of the warrant shews upon the face of it, that the bonus was against dividends: *Maclaren* v. *Stainton* (3); *Hoole* v. *Great Western Railway Company* (4).

It is not competent for directors to insist upon any application of dividends, except such as is authorized by the articles of association of the company: *Oakbank Oil Company* v. *Crum* (5); *Bates* v. *Mackinley* (6); *Clive* v. *Clive* (7).

These moneys arising from undivided profits were expressly divided by the directors as a bonus dividend.

[Kay, J., referred to *Paris* v. *Paris* (8) and *Browne* v. *Collins* (9).]

Paris v. *Paris* is no doubt to some extent against us, and so also is *In re Barton's Trust* (10); but these cases are distinguishable, and the more recent cases are in favour of our contention. In *In re Barton's Trust* the earnings in question had not been treated by the company as dividend.

[Kay, J., referred to *Brander* v. *Brander* (11) and *Barclay* v. *Wainewright* (12).]

The principle is, that in determining the relative rights of tenant for life and remainderman in such a case as this, the capital of the company is that which is defined as such by the articles of association. These moneys were not capital moneys at all. They were clearly income. They were in effect invested in the purchase of new shares; and although those new shares were allotted to Sir *Thomas Bouch*, and registered in his name, this was only done because the original shares stood in his name. No act of his

(1) Law Rep. 6 Ch. 503, 510.
(2) 4th Ed. p. 1080.
(3) 27 Beav. 460; 3 D. F. & J. 202.
(4) Law Rep. 3 Ch. 262.
(5) 8 App. Cas. 65.
(6) 31 Beav. 280.
(7) Kay, 600.
(8) 10 Ves. 185.
(9) Law Rep. 12 Eq. 586.
(10) Ibid. 5 Eq. 238.
(11) 4 Ves. 800.
(12) 14 Ves. 66.

could alter the relative rights of tenant for life and remainderman, and there is a resulting trust of these shares in favour of the tenant for life, with whose moneys they were bought.

[They also referred to *In re Hopkins' Trusts* (1).]

Hastings, Q.C., and *W. Freeman*, for the Defendants were not called upon.

KAY, J.:—

My decision on this special case is only upon the facts as therein stated, and upon those facts I am unable to decide that this property belongs to the tenant for life.

The position appears to be this. Under article 109 the directors of the *Consett Iron Company* had power, before recommending any dividend, to set aside out of the profits of the company such sum as they thought proper as a reserved fund for meeting contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and they might invest the sum or sums set apart as a reserved fund upon such securities or in such manner as they might think proper. That power is absolutely identical with the provision (rule 65), which the Court had to consider in *In re Barton's Trust* (2), and the decision in that case was that under such a power the company were authorized and entitled, if they thought fit, to capitalize the reserved fund, and, as was done in this case, to apply a portion of the net earnings during the half-year to necessary works, and issue new shares to represent the moneys so applied, the dividend being declared out of the remaining portion of the earnings of the company. I must, therefore, treat this as an authority that under such a provision the company would be empowered to deal with this reserved fund as a capital fund if they thought fit.

[His Lordship then stated the facts of the case, down to the passing of the special resolution passed at the general meeting held on the 4th of September, 1880, and continued:—]

Then on that very day notice was sent to the members of another meeting to be held on the 25th of September, 1880, to

(1) Law Rep. 18 Eq. 696. (2) Law Rep. 5 Eq. 238.

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confirm those resolutions. That meeting was held, the resolutions were confirmed, and this further resolution passed: "That this meeting sanctions a bonus of £2 10*s.* per share to be paid out of the £100,000 now standing to the credit of the reserve fund, and out of £38,000 part of the £43,316 6*s.* 1*d.* undivided profit now in hand."

I pause there to observe that the word "dividend" which was used in the report of the directors is now dropped; and the thing to be divided is called, and designedly called, a "bonus," and it is divided at this second meeting under the new power conferred by art. 109a, of dividing, not ordinary profits, but what they very properly call the bonus, because in truth it was taking a part of their reserved fund and the accumulated profits, a fund which was meant to provide for capital expenditure, and dividing that among the shareholders.

Now the first question that arises is, Would a tenant for life be entitled to a bonus so declared? Upon that there is a very considerable amount of authority. There is the case of *Paris* v. *Paris* (1), from which it is extremely difficult to distinguish the present. In *Paris* v. *Paris*, while a tenant for life of certain Bank stock was living, the *Bank of England* resolved that a dividend should be made of £3 10*s.* per cent. interest and profit for the half-year ending the 10th of October following. On the 25th of the same month, another resolution was carried "That the sum of £582,120, being at the rate of £5 per cent. upon the capital of the Bank, be divided among the present proprietors of Bank stock according to their respective interests." Lord *Eldon* had to decide whether the tenant for life was entitled to that, and he came to the conclusion that the tenant for life was not entitled. He said he could not distinguish the case from *Irving* v. *Houstoun* (2), and that he had had great difficulty in stating the principle which led to the decisions. "But," he continued, "in the case from *Scotland* great inquiry was made as to the length to which practice had carried the decisions here, and at the Rolls; and, as it appeared that it had gone to great length, the House of Lords did not think it proper to disturb that.

(1) 10 Ves. 185, 189.
(2) July 27, 1803. House of Lords printed Cases, vol. ii. pp. 267–279; 4 Pat. Sc. App. 521.

That decision having been made by the House of Lords, the only ground of distinction in this case is, first, that there is great probability, perhaps moral certainty, that these profits were made during the time of the tenant for life. But that will not do; for it comes to this, that in every case, in which inquiry can determine, that the tenant for life ought to have them, they ought to go according to the result of that inquiry; and that was much considered in the House of Lords. As to the distinction between stock and money,"—said his Lordship, referring to the previous case in which the division had been of stock, and payable to the holders of shares in the form of stock—"As to the distinction between stock and money, that is too thin; and, if the law is, that, this extraordinary profit, if given in the shape of stock, shall be considered capital, it must be capital, if given as money. It would be too dangerous to distinguish this case upon those distinctions. It is true, the Bank have it in their power to give the bonus to the tenant for life, or not." That is, they need not have declared any bonus at all, unless they pleased.

I do not find any case in which that decision has been departed from. On the contrary there are a number of cases, and they are all referred to in Lord Justice *Lindley's* book (1), in which it has been followed. In one of the decisions, a case of *Barton's Trust* (2), where, as I have said, the provision was in terms identical with art. 109, Lord *Hatherley*, then Vice-Chancellor, held that when the company had made its division by giving the shareholders new fully paid-up shares, that it was quite within their power to treat the reserved fund as capital. These are his words (3): "Instead of dividing it out as profit they may say, 'It is not convenient to anybody to go into the market with fresh shares (and this I suppose was their view), and therefore we call upon you, the shareholders, to stay your hands and not to ask for the full amount in dividends, but to have an equivalent in shares paid over to you, so that the dividend may be reserved and carried over to the coffers of the company as capital.' I apprehend it was competent to them to do that by resolution, and that they fairly might consider this as a contingency specified." He then refers

(1) 4th Ed. p. 1080, n. (2) Law Rep. 5 Eq. 238.
(3) Law Rep. 5 Eq. 244.

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to *Paris* v. *Paris* (1) as being an undoubted authority and one that was binding on him.

Now I do not go through the cases, because that is not the point on which I think it incumbent upon me to decide this case. It is enough for me to say that this case is so extremely like *Paris* v. *Paris* that if there were nothing else in the case it would be very questionable whether any extraordinary division of accumulated profits, most of which have been carried to a reserve fund, would belong, when given as a bonus under a rule, like this new rule 109a, to the tenant for life. It is enough for me to say it would be a question deserving of great consideration before it was determined.

But what do I find here? [His Lordship then referred to the statements in the special case as to the mode in which those resolutions passed at the two meetings of the company were carried out, and after reading the letter and "bonus dividend warrant" sent by the registrar of the company to the shareholders, continued:—] At the bottom of that warrant was this form: "I hereby authorize and request you to apply the above amount in payment of the call of £7 10*s.* per share on the 200 new shares that have been allotted to me in accordance with the special resolutions passed at the ordinary general meeting." Sir *Thomas Bouch*, the executor and trustee of the estate, signed that form and sent it back, and therefore assented completely to the capitalization of this so-called bonus of £2 10*s.* per share on the 600 shares, and it was turned into new shares, that is to say, it was used for the purpose of paying up £7 10*s.* per share on the new shares, which, observe, had been allotted, and the allotment had been notified to him in that way.

Now it may have been, and I think it was, open to Sir *Thomas Bouch* to say, "I will not apply the dividend warrant in that way." But what would have been the consequence if he had? The consequence, it seems to me, would have been that under clause 32 of the articles of association the company might have cancelled the shares, for that clause provides, dealing with the increase of capital by the issue of new shares, "If any member shall not testify his acceptance of his allotment in form, within the time

(1) 10 Ves. 185.

and upon the terms appointed and prescribed, such allotment shall be deemed to be cancelled and the shares thereby allotted forfeited to the use of the company, and the directors may, with the sanction of a general meeting, allot or otherwise dispose of such shares as they think fit." So that although there was an option, they seemed to take for granted, the shares being, as I understand, at a high premium and extremely valuable, that no one would avail himself of such option, and that the shares would be accepted as a matter of course. The special case then goes on to say that the 200 new shares in the company were registered in the name of Sir *Thomas Bouch*, and £7 10*s.* was credited as paid on each share, and that the reserve fund represented profits made before the death of *William Bouch*. Therefore the case is very much stronger indeed than *Paris* v. *Paris* (1), where the amount divided actually was profit earned during the lifetime of the tenant for life, as they there state it was made partly before and partly after the death of *William Bouch*.

Now this special case is stated between the executors of the tenant for life and the people entitled in remainder to the original shares, and it asks in effect whether these new shares are to be treated as belonging to the estate of *Jane Bouch*. The argument, which has been well worth listening to, and, I need not say, very ably urged, was this—the moneys so divided were, the moment the resolution was passed at the second general meeting, moneys which belonged to the tenant for life. Well, that is so if *Paris* v. *Paris* does not apply to this case. But if this case comes within *Paris* v. *Paris* it is not so. Then it is said that these moneys were invested in the purchase of new shares, and it was absolutely necessary that the new shares should be allotted to Sir *Thomas Bouch* because the old shares stood in his name, and there was a resulting trust to *Jane Bouch*, because they were bought with her money.

Now there are two or three answers to this argument. One is this: in the first place it was not necessary that they should be in the name of Sir *Thomas Bouch*, because the letter to him contained this clause, "If you desire to have all of them registered in some other name please say so." So that if he liked he could

(1) 10 Ves. 185.

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have required the registration to be in the name of *Jane Bouch*. Or if that course was not adopted, and the shares were allotted to Sir *Thomas Bouch* and registered in his name, he might still, if they were to be treated as *Jane Bouch's* property, have declared a trust of them in her favour. Nothing of that kind was however done so far as appears upon the special case. I must assume, of course, that all parties knew exactly what their rights were, and I will for the moment assume also that *Paris* v. *Paris* (1) does not apply, and that *Jane Bouch* could have claimed these moneys for herself. What does she do? She allows the moneys to be capitalized. She allows them to be employed in the purchase of these new shares in the name of Sir *Thomas Bouch*. She takes no declaration of trust. She does not get him to suggest that they should be registered in her name; and what am I to infer as the result of that? I must infer that any resulting trust which I might otherwise be obliged to say existed in this case is rebutted by that course of conduct, and that it was evident that she did not intend they should be her property, but that she did intend they should be treated, like the original shares, as part of the capital of the estate of the testator.

But then surely the inference is enormously strengthened when the case is one which seems to come exactly within the decision of *Paris* v. *Paris*, and such that any one well acquainted with the law who advised Mrs. *Bouch* as to her rights at the time, would have told her that there was a question of some doubt, at least, to put it at the very lowest, whether she could have claimed the money as her own. Looking to her conduct, if that had been the advice given to her, I could only come to one conclusion, namely, that she was determined that the shares should be treated as the capital of the testator's estate in order to avoid raising any question of this kind. I therefore come to the conclusion, that upon this special case it is impossible for me to give any other answer than that these shares belong to the estate of the testator.

W. W. K.

C. A. The Plaintiff appealed, and the appeal was heard on the 20th and 21st of February, 1885.

(1) 10 Ves. 185.

Rigby, Q.C., and *H. Burton Buckley*, for the Appellant:—

Whether a bonus is capital or not, depends upon whether the company makes it capital or income. A bonus dividend is income, unless the company does something to make it capital. Here the company did not, it was only the act of the trustee that made it capital. The bonus dividend came to the hands of the trustee as money, he applied it in taking up shares, and having acquired them with trust money which belonged to the tenant for life, he cannot retain them for his own benefit. In the case of *Barton's Trust* (1) the company simply allotted new paid-up shares. Whether this was not *ultrà vires* might be questioned; but the Vice-Chancellor thought it was authorized, and if so, it was a clear turning of the unappropriated profits into capital. If, on the true construction of these proceedings, the company made this bonus capital, we are out of Court; but we say that they did not do so.

[BOWEN, L.J.:—Was not the warrant conditional on the bonus being applied in taking the shares?]

No; we say that the company could not declare a bonus subject to a condition that if the shareholder did not apply it in taking shares not fully paid up, he should not have it; nor did they intend to impose such a condition. They made him an offer of a very advantageous investment, if he had not accepted it he would have received his bonus in cash, and the shares which he did not accept would have been disposed of for the benefit of the company. The question in all these cases is, whether the profits have been capitalized by the company: *Lindley* on Partnership (2). *Maclaren* v. *Stainton* (3) is a strong case in our favour. *Paris* v. *Paris* (4) was relied on by Mr. Justice *Kay*, but that case lays down no principle that makes against us, Lord *Eldon* having merely followed a series of decisions as to Bank stock, of which he confessed himself unable to state the principle.

[FRY, L.J., referred to *Carron Company* v. *Hunter* (5).]

(1) Law Rep. 5 Eq. 238.
(2) 4th Ed. 1080.
(3) 3 D. F. & J. 202.
(4) 10 Ves. 185.
(5) Law Rep. 1 H. L. Sc. 362.

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That is an authority for us. *Price* v. *Anderson* (1) clearly states the principle to be applied.

[They were then stopped by the Court.]

Hastings, Q.C., and *W. Freeman*, for the Defendants :—

There is one material fact omitted from the special case, that the company in September, 1880, declared a dividend of £1 2*s.* 6*d.* per share, "less income tax," and then declared this bonus dividend without saying anything as to income tax. That goes far to shew that they did not treat the bonus as income.

[FRY, L.J. :—How could they make it capital? They had no power to increase their capital except by the issue of new shares.]

Paris v. *Paris* (2) answers that; the *Bank of England* had no power to increase its capital. The facts of that case are substantially the same as those of the present.

[BOWEN, L.J. :—If your reading of that case is correct, *Price* v. *Anderson* must be wrong.]

Witts v. *Steere* (3) raised the same point. It was held that if the bank did not increase the dividend, but declared a bonus in addition to the dividend the bonus was capital. The time at which the profits were earned makes a difference, as is shewn by *Plumbe* v. *Neild* (4), where *Kindersley*, V.-C., held a bonus out of an accumulation of profits to be capital. *Ward* v. *Combe* (5) goes on the same ground.

[FRY, L.J. :—I have some difficulty in understanding how a company should have power to say that a sum shall be capital as between tenant for life and remainderman. I understand their having power to say whether a sum is part of their capital, or part of their profits, and divisible as such.

BAGGALLAY, L.J. :—The company are not supposed to know anything about tenant for life and remainderman. They only know the registered holder.]

Price v. *Anderson* does not seem to bear much on the point.

(1) 15 Sim. 473.
(2) 10 Ves. 185.
(3) 13 Ves. 363.
(4) 29 L. J. (Ch.) 618.
(5) 7 Sim. 634.

[Baggallay, L.J.:—It seems to lay down the principle that what is distributed in the way of a dividend is profits. *Barclay* v. *Wainewright* (1) agrees with that view.]

The other cases as to Bank stock are decidedly in our favour, and in that case there was in terms a dividend by way of income, not a bonus.

[Baggallay, L.J.:—Does not Bank stock stand on a different footing from shares in general? It has been the subject of various General Orders in Chancery.]

In *Irving* v. *Houstoun* (2), Lord *Eldon* negatives the idea of the tenant for life being entitled to the whole of a bonus out of accumulated profits, and says that either the whole must be capital, or there must be an inquiry as to the period during which the profits were earned. The former alternative was taken.

But, if we are wrong in that, we say that the company proposed to deal with this bonus as capital, and had power to do so. It is admitted in *Maclaren* v. *Stainton* (3) that if the company set apart a sum as capital, it would be capital as between tenant for life and remainderman. Here the intention was manifest to distribute a bonus as capital in the shape of partially paid-up shares. We have not a resolution for a large dividend, but two separate resolutions, one for a dividend, the other for a bonus, shewing that two different things were intended. There is no principle on which a bonus out of profits made during the testator's life, can be considered as income of his residuary estate.

Rigby, in reply:—

[Baggallay, L.J.:—I should wish to hear you on the point, that nearly the whole of this bonus arose from accumulations made during the life of the testator.]

I say that on the authorities that makes no difference. The case of Bank stock was an exceptional one. There is a General Order of the 23rd of November, 1805 (4), directing how much a person entitled to half-yearly dividends of Bank stock in Court was to receive. There can be little doubt that a similar practice had prevailed before, as the observations of Lord *Eldon* in *Paris*

(1) 14 Ves. 66.
(2) 4 Pat. Sc. App. 521.
(3) 3 D. F. & J. 202, 214.
(4) Sanders Ord. in Chancery, 680.

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v. *Paris* (1) seem to shew. He there shews that he did not consider the practice to be founded on any principle. In *Paris* v. *Paris* Lord *Eldon* holds that there must not be any inquiry as to when the profits were earned.

[*Hastings* referred to *Dale* v. *Hayes* (2).]

Ward v. *Combe* (3) went on the declaration of the company that the sum was capital.

[Fry, L.J.:—The real principle of that case seems to me to be, that a payment out of accumulated profits is to be taken as capital. Have you any case where the whole of a bonus paid out of an accumulation of past profits has been given to a tenant for life?]

In re Hopkins' Trusts (4) is such a case, and *Clive* v. *Clive* (5) goes far in the same direction. In *Plumbe* v. *Neild* (6) *Kindersley*, V.C., does not express any opinion that the fact of the money out of which the bonus was paid having been earned in past years makes it capital, he treats the company as having made it so. In *Dale* v. *Hayes* it was only held that in the absence of evidence that the profits had not been earned during the lifetime of the tenant for life they were income. There is no decision that, in a company like this, there can be any inquiry as to the period in which the profits were realized. It very often would be impossible to answer the inquiry, and, as between the shareholder and the company, they are not profits till the company declares them such. In *Paris* v. *Paris* Lord *Eldon* rejects the inquiry as impracticable. The fruit must be picked up when it drops. It is admitted here that by far the greater part of the sum distributed in bonus was realized during the testator's life, but if that is a ground for treating it as capital, there must be an inquiry in every case as to when the profits were earned.

1885. March 18. The judgment of the Court (*Baggallay*, *Bowen* and *Fry*, L.JJ.) was delivered by Fry, L.J., who, after stating the facts of the case, proceeded as follows:—

The learned Judge from whom this appeal was brought has

(1) 10 Ves. 185.
(2) 19 W. R. 299.
(3) 7 Sim. 634.
(4) Law Rep. 18 Eq. 696.
(5) Kay, 600.
(6) 29 L. J. (Ch.) 618.

determined that the 200 new shares in the *Consett Iron Company* were capital of the testator's estate, and as such belonged to Sir *Thomas Bouch* as the tenant in remainder, and now belong to the Defendants as his legal personal representatives.

This decision he arrived at mainly upon two grounds, first, that this case is governed by the decision of Lord *Eldon* in *Paris* v. *Paris* (1), to which we shall hereafter refer; and secondly, if this were not so, yet that Mrs. *Jane Bouch* by her course of conduct rebutted any trust which might otherwise have resulted in her favour. In this latter ground for his decision we are not able to concur with the learned Judge. The special case appears to us to be entirely silent as to the conduct of the tenant for life, and even as to her knowledge of what was done, and we cannot therefore rely upon anything which she may have done or omitted to do in respect of these shares.

In addition to the argument from acquiescence or conduct, two other arguments have been adduced on behalf of the Defendants. First, that independently of the way in which the company associated the declaration and payment of the bonus with the issue of new share capital, the bonus had become capital; and secondly, that if not so, yet that in the present case the bonus was in fact, by the proceedings of the company, converted into share capital.

The two points require separate consideration.

The general principle applicable to the first of these inquiries may in our opinion be thus stated. When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word what the company says is income, shall be income, and what it says is capital, shall be capital.

(1) 10 Ves. 185.

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This seems to us to have been the principle of the decision in the case of *Brander* v. *Brander* (1) before Lord Chancellor *Rosslyn* in 1799, which is we believe the earliest reported decision on this question. After the testator's death the *Bank of England* had subscribed £1,000,000 out of their funds for the service of the public, and had received back annuities representing at 5 per cent. a capital sum of £1,250,000, which annuities they divided amongst their shareholders, including the testator's representatives. The Lord Chancellor seems to have proceeded on the ground that the original £1,000,000 was part of the capital of the Bank, for he says: "I have often considered this question; and it seemed to me, in all the different ways I could turn the consideration of it, that there was no way to be taken but to consider it" (*i. e.* the saving by the Bank) "as an accretion to the capital." If that were so it follows that the Bank was distributing amongst its proprietors that which had been returned by the Government in satisfaction for the outlay of a part of its capital.

So, in the next case in chronological order which is to be found in the reports, that of *Irving* v. *Houstoun* (2), Lord *Eldon* in addressing the House put the decision of the case in favour of the bonuses on the stock of the *Bank of Scotland* being capital, upon the proposition that the accumulated profits had become part of the floating capital of the concern.

It is not needful to pass in review most of the intervening cases, many of which throw little light upon the principle involved. It will be sufficient to refer to two of the more recent authorities.

In the case of *In re Barton's Trust* (3), where the company, having power so to do, converted money remaining undivided in their hands into a payment on new shares allotted to the old shareholders, Lord *Hatherley* said (4), "Where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time. I think that is the true principle."

And again in *Maclaren* v. *Stainton* (5), where a large sum was

(1) 4 Ves. 800, 801.
(2) 4 Pat. Sc. App. 521.
(3) Law Rep. 5 Eq. 238.
(4) Ibid. 245.
(5) 3 D. F. & J. 202.

received by the company in one year, by way of compromise for a claim which had been growing during many years, and this sum was divided amongst the shareholders by way of bonus: "If it," (the debt), said *Turner*, L.J. (1), "has been reserved and set apart as capital, it would, as I apprehend, of course be capital as between the tenant for life and remainderman; but if it has not been so reserved and set apart, and there be nothing more than that the debt has been got in, it must, as I conceive, be considered as income, and not capital."

It has however been pressed upon us by counsel for the Defendants that the authorities have gone further, and have established a rule of law or of evidence to this effect, that where a sum is paid, whether called bonus or dividend, out of the accumulations of profits in previous years, it must be taken as a payment out of or on account of capital; and this it has been argued is made very clear, whenever on the same shares and at the same time two sums are paid, the one by way of ordinary dividend out of the year's or half-year's profits, and the other by way of bonus or extraordinary dividend out of the accumulation of profits in preceding periods.

Before examining the cases we will observe that on principle such a conclusion would not seem to us to be tenable. The profits of past years are not necessarily or in their nature capital, they may be retained for a year or years as a fund to prevent recourse to capital in case of loss, or for the equalization of future dividends, or merely for convenience of division; in fact profits appear to us to retain their character of income till they are converted into capital. Furthermore, the question whether profits remain income or have been capitalized is in its nature a mere question of fact, and unless a series of decisions as to the effect of similar proceedings by companies, has, so to speak, turned this question of fact into a question of law, we should not regard the decisions as binding on the inquiry. Some decisions were, however, cited to us that seemed to support the contention, and made an investigation into the authorities appear necessary to us.

With regard to Bank stock, there is undoubtedly a series of cases which have gone upon the principle suggested by Lord

(1) 3 D. F. & J. 215.

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Eldon in *Irving* v. *Houstoun* (1), that profits remaining undivided from year to year do, according to the constitutions of the *Bank of England* and *Scotland*, pass into and become part of the capital of the company. These cases appear to have begun with an unreported decision of Lord *Alvanley*, on Lord *Calthorpe's* will (2), and were followed by the cases of *Brander* v. *Brander* (3) and *Irving* v. *Houstoun*, to which reference has already been made. These were followed by *Paris* v. *Paris* (4), where the question arose between a tenant for life and remainderman in respect of a bonus declared on stock in the *Bank of England*, there being nothing on the face of the resolution to shew whether the bonus was paid out of capital or income, and Lord *Eldon* followed the previous decisions in *Brander* v. *Brander* and *Irving* v. *Houstoun*. This is the authority on which Mr. Justice *Kay* has relied as governing the present case. But it is a case in which it is difficult to find any enunciation of principle, and it must, we think, be taken to rest on the ground, that in that case, as in *Brander* v. *Brander*, the conduct of the Bank had converted profits into capital.

The series of cases on Bank stock is continued by *Clayton* v. *Gresham* (5), where Lord *Eldon* followed his decision in *Paris* v. *Paris*; by *Witts* v. *Steere* (6), where Lord *Erskine* followed in the same line; by *Barclay* v. *Wainewright* (7), where Lord *Eldon* held a dividend at 5 per cent. for a half-year to be, as to the whole of it, the property of the tenant for life; by *Hooper* v. *Rossiter* (8), where *Alexander*, C.B., held that a sum declared by statute to be an increase to the Bank stock was what it was declared to be, capital; and lastly by *Preston* v. *Melville* (9), where the Vice-Chancellor of *England* held a tenant for life to be entitled to a bonus out of interest and profits, declared at the same time with, and in addition to, a dividend out of the interest and profits for the half-year.

These cases, however binding they may be under similar circumstances with regard to the same stocks, certainly do not appear

(1) 4 Pat. Sc. App. 521.
(2) 14 Ves. 77.
(3) 4 Ibid. 800.
(4) 10 Ibid. 185.
(5) 10 Ves. 288.
(6) 13 Ibid. 363.
(7) 14 Ibid. 66.
(8) M'Clel. 527.
(9) 16 Sim. 163.

to us to support to any extent the proposition now under investigation. The last case, viz., that of *Preston* v. *Melville* (1), seems to lean strongly in the other direction.

There are not, however, wanting cases arising on shares or stock not in the *Bank of England* or *Scotland*, which somewhat lean in favour of the view that accumulated profits constitute capital. Thus in *Ward* v. *Combe* (2) the question arose in respect of certain shares in the *London Assurance Company*, which were vested in trustees of a marriage settlement, on the usual trusts for life of the husband and wife with remainder to the children. It contained a provision that in case any bonus should be given by way of increase of capital of the stock the same should be added to the capital of the trust fund, but if by way of interest or dividend it should be paid to the person entitled to receive the dividend for the time being. A large accumulation had been made by reservations of profits during many years, and at a Court held in October, 1835, the ordinary dividend of £1 per share was voted, and by another resolution, passed the same day, it was provided that a sum at the rate of £12 per share should be taken out of the profits of the company and divided amongst the proprietors. The Vice-Chancellor held that the £12 a share was capital, that it was not given by way of dividend, but in contradistinction to what was given as dividend, and he observed that there was nothing to shew at what time the profits out of which the sum was taken arose, and that they might have been profits that had laid dormant for a series of years. And again in *Plumbe* v. *Neild* (3), *Kindersley*, V.C., in the course of his judgment, drew the distinction between payments out of the profits of the half-year, and payments out of accumulations; and he seems to have considered the former to be income, and the latter capital. "If a bank," he said, "in carrying on business, finds that there is an accumulation of profits to be divided, not merely as the income of any particular half-year, but forming part of the capital, so that you cannot go back and attribute any part to each preceding half-year, then the authorities would apply; but not where the sum divided is mere dividends of the actual half-year's profit." And

(1) 16 Sim. 163.
(2) 7 Sim. 634.
(3) 29 L. J. (Ch.) 618, 619.

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the same learned Vice-Chancellor expressed similar views in the cases of *Hollis* v. *Allan* (1) and *Nicholson* v. *Nicholson* (2).

These authorities, however, do not stand alone, and there are authorities which look in the opposite direction.

In *Price* v. *Anderson* (3) the same Judge who had decided the case of *Ward* v. *Combe* (4) held, in the case of a company of which the practice was, to declare dividends on their stock half-yearly, and bonuses at intervals of two, three, or more years, that a dividend of £12 10*s.* per cent., declared in addition to the ordinary dividend, belonged entirely to the tenant for life; and in *Dale* v. *Hayes* (5), where bonuses were declared on *East and West India Dock* stock out of the profits of the company generally, and in addition to ordinary dividends, *Stuart*, V.C., said, "I am at a loss to understand the distinction of *Kindersley*, V.C., in *Plumbe* v. *Neild* (6) between bonuses derived from profits which accrued during the half-year immediately preceding the declaration of the bonus, and those derived from an accumulation of profits; for as long as they are derived from profits accruing during the lives of the tenants for life, in my opinion it is for the remaindermen to shew that they do not belong to such persons;" and again in *In re Hopkins' Trusts* (7), where dividends were paid out of the ordinary profits of the company, and at intervals of five years other dividends were paid out of a surplus fund accumulated during that period, *Hall*, V.C., held that the payment out of the surplus fund belonged to the tenant for life.

These cases are sufficient to shew that there has been no such continuous and unbroken current of authorities as would be required to establish such a doctrine as was contended for, viz., that payments out of accumulated profits were necessarily to be treated as payments out of capital. On the contrary, as is reasonable, the authorities leave the inquiry as one of fact upon the circumstances of each case.

The authorities appear to us further to establish this proposition, that in most, if not in all, cases, the inquiry as to the time when the profits were earned by the company is an immaterial

(1) 14 W. R. 980.
(2) 30 L. J. (Ch.) 617.
(3) 15 Sim. 473.
(4) 7 Sim. 634.
(5) 19 W. R. 299, 300.
(6) 29 L. J. (Ch.) 618, 619.
(7) Law Rep. 18 Eq. 696.

one as between the tenant for life and remainderman. Their rights have been made dependent on the legitimate action of the company, and (subject to any rights arising from the law of apportionment, with which we are not now dealing) we are of opinion that their rights are determined by the time, not at which the profits are earned by the company, but at the time at which they are by the action of the company made divisible amongst its members.

Such being the law applicable to the present inquiry, we have to consider whether the present company did by any act prior to the distribution in question make the accumulated profits part of their capital. A portion of the moneys in question had been carried to the reserve fund, which, by the 109th article of association, was appropriated for any of the following purposes: (1) meeting contingencies; (2) equalizing dividends; (3) repairing or maintaining the works connected with the business of the company. It appears to us to be plain that whilst some of these objects would be demands on capital, others, such as the payment of dividends and of the repairs and maintenance of the works of the company, are essentially payments out of income, consequently we are of opinion that the carrying of moneys to the reserve fund was not a capitalization of them.

The rest of the moneys in question were carried to the account of undivided profit, a step which, in our opinion, is not a conversion of profits into capital.

There remains another question, viz., whether the way in which the declaration of this bonus or dividend was coupled with the creation of new capital, did or did not amount to a capitalization of the bonus. The sanction of the company in general meeting to the payment of the bonus was given on the 25th of September, 1880, at which time the company confirmed special resolutions previously passed, authorizing the directors to allot the new shares. The resolution of the company as to the payment of the bonus is a substantive and independent resolution, and we do not think that it authorized the directors to make the payment of the dividend contingent on the acceptance of the new shares. Nor do we think that the directors did by their acts make the payment of the dividend contingent on the acceptance of the shares. No doubt the two operations, namely, the payment by the company of the dividend and the payment of the call on the new

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shares, were arranged so that they might take place together, and the papers shew an expectation, natural under the circumstances, that they would be carried into effect together, but we think that a shareholder who refused to take new shares, and to fill up the form of authority at the foot of the dividend warrant, would have been nevertheless entitled to recover his dividend from the company. One small circumstance in the matter shews that the two transactions could not be carried into effect strictly as one operation. The bonus was declared on each of the existing shares, a new share was to be allotted in respect of every three of these old shares, and, consequently, in the case of a person holding less than three shares, or holding any number not a multiple of three, the dividend on the odd share or shares must, in the absence of arrangement with some other member, have been paid in cash. For these reasons we conclude that the payment of the bonus was in its nature a mere distribution of profits kept *in medio* down to the time of its appropriation by the resolutions of the company, and that the effect of the proceedings of the company was not to convert the bonus into capital, except where by the will and action of the individual shareholder new shares were accepted, and his bonus set off against the call. The trustee of the testator's will had no authority from the testator or from the tenant for life so to convert her money into capital, and, consequently, Mrs. *Bouch's* representatives are entitled to claim as theirs the shares in which her money was invested.

The order, therefore, of *Kay*, J., must be discharged, and we answer the questions of the special case as follows:—

1. The bonus of £2 10*s.* per share, sanctioned on the 25th of September, 1880, on the 600 shares in the company was income of the estate of *William Bouch.*

2. The Plaintiff, as executor of *Jane Bouch*, is entitled to the 200 shares in the company allotted to Sir *Thomas Bouch*, and the dividends received thereon.

3. The costs of this special case here and in the Court below are to be borne by the Defendants.

Solicitor for Plaintiff: *R. T. Jarvis.*

Solicitors for Defendants: *G. H. Barber & Son.*

H. C. J.

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[1882 E. 1501.]

C. A.
1884
KAY, J.
April 25, 26
May 3.
C. A.
1885
March 17, 20, 30.

Vendor and Purchaser—Notice of Defects of Title—Repudiation by Purchaser—License to assign.

A railway company agreed to demise to *E.* for building purposes certain lands which they had acquired under their compulsory powers. *E.* was restrained from assigning without license. The property had formerly belonged to a building society, which had sold it in lots, each purchaser entering into restrictive covenants for the benefit of the owners of the other lots, and the conveyance to the company was expressly made subject to these covenants. *E.* agreed to sell his interest under the contract to *R.* *R.* at the time of the contract knew of the restrictive covenants, but believed that the compulsory purchase by the railway company had extinguished them. *E.* did not know of their existence. *R.*'s solicitors having discovered the existence of the covenants objected to the title. *E.*'s solicitors replied that the compulsory purchase had extinguished them. *R.* then refused to proceed with the purchase. *E.* brought a bill for specific performance, but having afterwards resumed possession, and built, in order to avoid a forfeiture, the action came on as an action for damages. *E.* had never obtained a license to assign :—

Held, by *Kay*, J., that as *E.* had not either at the time of the repudiation of the contract by the Defendant, or subsequently, obtained a license to assign, he never was in a position to perform his part of the contract, and therefore could not recover damages. *Semble*, also, that *R.* had not such knowledge that the property was still subject to the covenants as to debar him from requiring a title free from them.

Held, on appeal, that *R.* was entitled to object to the title on the ground of the restrictive covenants, for that in order to take a case out of the general rule that a purchaser is entitled to require a good title, it must be shewn that at the time of the contract he knew that a good title could not be made, and that here such knowledge was not shewn, as *R.* believed that the covenants had been extinguished.

Semble, that *R.*'s objection on the ground that a license to assign had not been obtained was not valid, inasmuch as he had repudiated the contract before the time had arrived at which it was necessary for the vendor to produce a license.

THIS was originally an action by the Plaintiff for specific performance of an agreement by the Defendant dated the 5th of December, 1881, to purchase the Plaintiff's interest under a building agreement dated the 14th of November, 1881, in a piece of land in *Middlesex*, bounded by the *Edgware Road*, *Loveridge Road*,

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and the *Metropolitan Railway*. By this building agreement the *Metropolitan Railway Company* agreed to grant the Plaintiff leases for eighty years of the houses to be built by him upon the ground when they were covered in, and the Plaintiff agreed to erect certain houses before the 25th of March, 1883. The agreement contained the following clause: "The lessee shall not wholly or in part assign or sublet these presents, or the benefit thereof, without the consent of the company first had and obtained, but such consent shall not be unreasonably withheld."

The land in question had formerly belonged to a land company, which in 1875 sold this along with other property in lots, subject to covenants that the trade of a victualler or retailer of wine, spirits, or beer, should not be carried on upon any lot except one particular lot. The *Metropolitan Railway Company* took under their compulsory powers a number of these lots from the purchasers. The piece of land now in question comprised the whole of one of these lots and portions of several others, and was not wanted for the purposes of the company's line and works. It did not include the lot on which a trade of a victualler might be carried on.

The Plaintiff, at the time when the agreement between him and the Defendant was entered into, did not know of the existence of the restrictive covenants in the conveyances of 1875. The Defendant knew of them, but was under the impression that the purchase by the company under their compulsory powers had done away with them as to all the lots which the company purchased. It appeared, however, on investigation, that the conveyances to the railway company had been made subject to the restrictive covenants.

On the 17th of February, 1882, the Defendant's solicitors having discovered the existence of the restrictive covenants, which did not appear on the abstract, wrote to the Plaintiff's solicitors calling their attention to these covenants. The Plaintiff's solicitors replied that the compulsory purchase had freed the land from them, and that the defendant had agreed to purchase such interest as the Plaintiff had. The Defendant, whose intention it had been to build an hotel on the land, refused on the 1st of April, 1882, to complete, and ultimately, in November, 1882, the Plaintiff commenced this action for specific performance.

In May, 1883, the company having threatened to resume possession because the buildings on the land were not proceeded with, the Plaintiff gave notice to the Defendant that unless the Defendant proceeded to complete, or give security for completion, the Plaintiff would proceed to dispose of the land, and amend his statement of claim by abandoning his claim for specific performance, and confining himself to a claim for damages. This accordingly was done.

The Plaintiff had not obtained a license from the railway company to assign to the Defendant.

The cause was heard before Mr. Justice *Kay* on the 25th and 26th of April, 1884.

Hastings, Q.C., and *Chubb*, for the Plaintiff:—

The Defendant was aware of the existence of the restrictive covenants before he entered into the contract, and accordingly was not justified in refusing to complete on account of them: *Mersey Steel and Iron Company* v. *Naylor, Benzon & Co.* (1); *In re Gloag & Miller's Contract* (2). They also referred to the case of *Williams* v. *Brisco* (3).

[KAY, J., referred to *Brewer* v. *Broadwood* (4).]

Robinson, Q.C., and *W. C. Druce*, for the Defendant:—

At the time of the contract the Defendant was aware of the existence of the restrictive covenants affecting the land, but he believed that they had been extinguished. He therefore contracted on the footing that a good title could be made free from incumbrances, and there has been nothing on his part amounting to a waiver of the objection he made when he discovered that the covenants were still binding. He in fact believed, as he was entitled to do, that the railway company in purchasing under their compulsory powers had freed the land from all incumbrances, if any, which affected it.

Moreover, down to the time of the institution of this action the Plaintiff had never obtained the consent of the railway company, without which he could not assign to the Defendant the benefit

(1) 9 Q. B. D. 648.
(2) 23 Ch. D. 320.
(3) 22 Ch. D. 441.
(4) 22 Ch. D. 105.

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his agreement, so that he never was in a position to perform his part of the contract, and accordingly cannot be entitled to any damages: *Forrer* v. *Nash* (1); *Wilson* v. *Hart* (2); *Clements* v. *Welles* (3); *Chitty* on Contracts (4); *Cato* v. *Thompson* (5); *Oldfield* v. *Round* (6).

Hastings, in reply.

1884. May 3. KAY, J.:—

This was originally an action for specific performance of a contract by the Defendant, dated the 5th of December, 1881, to purchase the Plaintiff's interest, under an agreement for a building lease, in a piece of land in the *Edgware Road*. The Defendant having refused to complete his purchase, the Plaintiff, after the commencement of the action, re-entered upon the land and began to build upon it, and he then amended the pleadings by striking out the claim for specific performance, and claiming only damages for breach of the agreement.

The subject of the contract was held by the Plaintiff under a building agreement dated the 14th of November, 1881, and made between the *Metropolitan Railway Company* and himself. The 5th clause of the agreement was, "The lessee shall not wholly or in part assign or sublet these presents, or the benefit thereof, without the consent of the company first had and obtained, but such consent shall not be unreasonably withheld." The 10th clause provided that if the Plaintiff should not, within twelve months from the 29th of September, 1881, have expended at least £1000 in materials and labour upon the erection of buildings, the company might re-enter, and the agreement should become void. On the 17th of February, 1882, the Defendant's solicitors wrote referring to certain covenants affecting the right of building and carrying on trades upon the property, and asked for evidence that the railway company had obtained a release of these covenants. The answer on the 28th was in effect that the land had been taken by the railway company under their

(1) 35 Beav. 167.
(2) Law Rep. 1 Ch. 463.
(3) Ibid. 1 Eq. 200.
(4) 11th Ed. p. 285.
(5) 9 Q. B. D. 616.
(6) 5 Ves. 508.

compulsory powers, and was therefore free from all stipulations. And on the 9th of March the Plaintiff's solicitors insisted that the agreement with the Defendant did not admit of the objection being raised—upon the ground that the Plaintiff only sold such interest as he had. On the 1st of April the Defendant's solicitor wrote declining to complete the purchase. It appears from the evidence before me, that the conveyance of a portion of the land in question to the *Metropolitan and St. John's Wood Railway Company*, whose interest was afterwards acquired by the *Metropolitan Railway Company*, was made subject to the rights of the owners of other land which, with this land, had been comprised in a general building scheme, to compel the observance of these restrictive covenants. The covenants themselves were expressed to be not only for the benefit of the vendor, but also of the owners of such other land, and were in terms covenants with such owners though they were not parties to the deed.

Supposing that the compulsory purchase would otherwise have absolved the railway company from the obligation to observe these covenants, the terms of the conveyance to them expressly reserved their liability. There can be no doubt that a restrictive covenant of this kind is a burden in the nature of an incumbrance which a purchaser is *primâ facie* entitled to be relieved from. But then it is said that the purchaser was aware of the existence of these covenants before entering into the contract, and therefore could not raise the objection. I gather from the evidence that the Defendant was not aware of the express obligation to the restrictive covenants contained in the conveyance to the railway company, and that he was under the belief that any other obligation had been destroyed by their purchase under their compulsory powers.

By the 81st section of the *Lands Clauses Consolidation Act*, 1845, a conveyance of land to a railway company purchased under the provisions of that Act, destroys all rights and interest in the land which shall have been purchased or compensated for by the consideration therein mentioned. If these restrictive covenants were an interest in the land, they might have been purchased by the railway company. If not, still if the company were empowered by their Acts to deal with the land in a manner contrary to such

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covenants, as was probably the case, compensation might have been obtained under sect. 68, as in *Eagle* v. *Charing Cross Railway Company* (1), and *Beckett* v. *Midland Railway Company* (2). In one way or other the railway company might, most probably under the powers of this Act, have freed themselves from such an obligation. I have no reason to suppose, from the evidence before me, that the Defendant, at the date of his contract, knew that they had not done so; such evidence as there is seems to be the other way. The belief that the covenants had been got rid of appears to me not to be unreasonable. And, on the 26th of December, 1881, the Plaintiff himself told the Defendant, who he was aware wished to build an hotel, that he was as free to build as the birds in May. Certainly I am not satisfied, upon the evidence, that the purchaser knew that these covenants were existing incumbrances which the Plaintiff could not discharge. The law, as stated in the cases of *Cato* v. *Thompson* (3) and *In re Gloag and Miller's Contract* (4), is that where the contract does not expressly provide that there should be a good title, the knowledge of the purchaser before the contract that there was a defect which the vendor was unable to remove, prevents his raising an objection on that ground. But it is essential that the purchaser should have knowledge, not only of the existence of the incumbrance, but of the vendor's inability to remove it. The Master of the Rolls pointed out in the former case, that mere knowledge of the existence of incumbrances raised no inference against a purchaser that he bought subject to them, and I should hesitate to hold that such knowledge as this purchaser had implied a contract to purchase the interest of the Plaintiff subject to the burden of these covenants. I have more difficulty concerning the alleged waiver by retaining possession and dealing with the land after the repudiation of the contract.

But another objection is raised on the ground that the Plaintiff, at the time when the contract was repudiated, and at the time of bringing this action, was not in a position to assign to the Defendant the benefit of his agreement with the railway company, because he had not obtained the license of the railway company

(1) Law Rep. 2 C. P. 638.
(2) Ibid. 3 C. P. 82.
(3) 9 Q. B. D. 616.
(4) 23 Ch. D. 320.

to make such assignment. It is settled by a series of cases, one of the last of which is a decision of the Court of Appeal, *Noble* v. *Edwardes* (1), that in an action of this kind it is an essential averment in the plaintiff's pleadings that he was ready and willing to make the assignment. Readiness involves ability to perform the act, and when the plaintiff has not that ability, at the time of bringing his action, he is not entitled to recover damages for the defendant's breach of the agreement: *Brewer* v. *Broadwood* (2).

In this case it is admitted that no license had been obtained, but it is said that as such license was not to be unreasonably withheld, the Court must infer that it would have been given as a matter of course. I do not think it possible to make such an inference, even if that were material, because, for aught I know, the company might have made a very reasonable objection to accept the Defendant as their tenant, for it seems that his pecuniary position was such that in the month of August, 1882, he went into liquidation.

Then it is urged that the case is analogous to the non-performance by the Plaintiff of a condition precedent contained in the contract, from which it is said, on the authority of *Williams* v. *Brisco* (3), the Plaintiff would be discharged if the Defendant absolutely refused to perform the contract. But the distinction is obvious and considerable. A condition precedent of that kind is an act to be performed by the Plaintiff himself, and the absolute repudiation of the contract makes it unnecessary for him to go through what would be the idle form of fulfilling that condition, he need only shew that he was able and willing to perform it, as was decided by Lord *Mansfield* in *Jones* v. *Barkley* (4). But here the act, without which the Plaintiff cannot assign to the Defendant, is not an act to be done by the Plaintiff himself, but is a license to be granted by a third person which had not been obtained, and therefore the Plaintiff cannot shew that he was ready to perform his part of the contract. If the Plaintiff were to recover damages although it might be impossible that he should ever assign the benefit of the agreement, that would be a great injustice.

(1) 5 Ch. D. 378.
(2) 22 Ch. D. 105.
(3) 22 Ch. D. 441.
(4) 2 Dougl. 684.

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This is a common law action, in which it is essential in order to entitle the Plaintiff to succeed that he should plead and prove that he was ready, that is to say able, to perform the contract on his part. He was not so able, and the objection being insisted upon by the Defendant it is, in my opinion, a bar to his right to recover damages, and I must dismiss this action with costs.

T. F. M.

C. A.

The Plaintiff appealed, and the appeal was heard on the 17th and 20th of March, 1885.

Hastings, Q.C., and *Chubb*, for the appeal:—

The Defendant was precluded from objecting to the title by his knowledge of the existence of the covenants when he entered into the contract: *In re Gloag and Miller's Contract* (1). The case is different where the vendor expressly agrees to make a good title: *Cato* v. *Thompson* (2). Here there is no such express agreement. That the covenants were not extinguished by the purchase by the railway company is clear: *Duke of Bedford* v. *Dawson* (3); the effect of a compulsory purchase being only to extinguish easements which it is necessary for the purposes of the railway to extinguish. The Defendant cannot take advantage of his having misunderstood the law. Then as to the point on which Mr. Justice *Kay* decided the case, the Defendant repudiated the contract before it had become incumbent on the Plaintiff to obtain a license to assign. There was not, as in *Williams* v. *Brisco* (4), a condition precedent to be performed by the Plaintiff. In *Frost* v. *Knight* (5) it was held that an action for repudiation of a contract would lie at once though the time when it was to be performed had not arrived.

Robinson, Q.C., and *W. C. Druce*, *contrà*:—

First, as to the absence of a license to assign. Owing to the want of it the Plaintiff was not in a position to make a title.

[COTTON, L.J.:—Was it necessary on the 1st of April that the Plaintiff should be ready with a license to assign?]

(1) 23 Ch. D. 320.
(2) 9 Q. B. D. 616.
(3) Law Rep. 20 Eq. 353.
(4) 22 Ch. D. 441.
(5) Law Rep. 7 Ex. 111.

Mason v. *Corder* (1) is on all fours with the present case.

[COTTON, L.J.:—An assignment was tendered, and an action was brought for refusing to accept it. As it was not accompanied by a license to assign, the refusal was right.

BOWEN, L.J.:—This is an action for repudiating the contract, and it is no answer to say that the Plaintiff had not done something he was bound to do, unless he refused to do it, so as to repudiate the contract.]

It must be shewn that the Plaintiff was always willing and ready to execute a conveyance: *Poole* v. *Hill* (2); *Chitty* on Contracts (3).

Then as to the purchaser's knowledge of the existence of the covenants; in order to bring a case within the exception from the rule that a purchaser can require a good title, it must be shewn that at the time of the contract he knew that the vendor could not make a good title, so that the purchaser must be deemed to have contracted on that footing. Here the purchaser was under a reasonable belief that a good title could be made.

Hastings, in reply.

1885. March 30. COTTON, L.J.:—

This is an appeal from the dismissal of an action which was originally one for specific performance of an agreement to purchase the Plaintiff's interest under a building agreement, but, pending the suit, the Plaintiff having, in order to avoid a forfeiture, been obliged to take possession, and having so acted that he could no longer claim specific performance, the action came on for trial as an action for damages.

Two objections were taken to the Plaintiff's title to relief; first, that the property was subject to restrictive covenants not referred to in the contract; and secondly, which was the ground on which Mr. Justice *Kay* appears to have mainly decided the case, that the Plaintiff had not obtained from his lessors a license to assign.

(1) 7 Taunt. 9. (2) 6 M. & W. 835.
(3) 11th Ed. p. 286.

C. A. 1885 ELLIS v. ROGERS. Cotton, L.J.

As regards the first point: The railway company entered into the building agreement with the Plaintiff, not imposing on him any restriction as to the trades to be carried on in the houses which he was to build, but restraining him from assigning the benefit of the contract without license. The property had, however, on a former occasion, before it was acquired by the railway company, been made subject to restrictive covenants. The Plaintiff, when the agreement between him and the Defendant was entered into, did not know of these covenants. The Defendant knew of them, but was under an erroneous impression that the purchase by the railway company under their compulsory powers had put an end to them. The Defendant objects that these covenants prevent the Plaintiff from making a good title. The Plaintiff contends that the general rule that a purchaser is entitled to require a good title, is subject to this exception, that where the purchaser at the time of the contract knows the property to be subject to charges which cannot be got rid of, he cannot resist specific performance on the ground of those charges. The general rule has been stated in different ways. Lord *St. Leonards* says (1): "In contracts for sale of real estate, an agreement to make a good title is always implied unless the liability is expressly excluded." In *Doe* v. *Stanion* (2) Baron *Parke* says: "In contracts for the sale of real estate, an agreement to make a good title is always implied, of which the case of *Souter* v. *Drake* (3) is a strong instance." In other cases, and especially in *Ogilvie* v. *Foljambe* (4), the right to require a good title appears to be spoken of as collateral to the contract. Sir *W. Grant* says (5): "Here the controversy between the parties is altogether collateral to the agreement. No term in the written agreement is sought to be varied or added to. The right to a good title is a right not growing out of the agreement between the parties, but which is given by law. The defendant insists on having a good title, not because it is stipulated for by the agreement, but on the general right of a purchaser to require it; and the answer is, he has waived it, having chosen to go on with and

(1) Sug. V. & P. 14th Ed. p. 16.
(2) 1 M. & W. 695, 701.
(3) 5 B. & Ad. 992.
(4) 3 Mer. 53.
(5) 3 Mer. 64.

conclude the agreement after he had full notice that he was not to expect it. I take this to be matter of notice and not of contract." It might under some circumstances have been necessary for us to decide on which of the two grounds the right to a good title rests, whether it depends on an implied term in the contract, or is a collateral right given by the law. But in the present case I think that we need not decide that question, for, whatever be the foundation of the rule, it is necessary in order to bring a case within the exception, that there should be knowledge on the part of the purchaser that he cannot get a good title. Here such knowledge is not shewn. It is true that the purchaser knew of the existence of the covenants, but he believed that they were done away with by the company's taking the land under their compulsory powers. The vendor knew nothing of the covenants. The purchaser knew of them, but thought that they had been discharged, so that both parties were contracting on the footing that a good title was to be made, and as a good title cannot be made, the purchaser is not bound.

This makes it unnecessary to decide the point on which Mr. Justice *Kay's* decision mainly proceeded, but it must not be considered that I agree with him. The vendor up to the time when the purchaser refused to go on, had been ready and willing to do all that was required to be done by him up to that time, and the proceedings had not reached the stage when it was necessary for him to be furnished with a license to assign. It seems to me, therefore, that if there had been no other objection to the Plaintiff's title he would have been entitled to relief, but I do not decide the point.

BOWEN, L.J.:—

I entirely agree with the judgment of Lord Justice *Cotton*, who has exactly expressed my ideas on both points. As at present advised I dissent from the conclusion of Mr. Justice *Kay* as to the result of the vendor's not having procured a license to assign.

FRY, L.J.:—

I am of the same opinion. The contract was entered into on the 5th of December, 1881, and on the 1st of April, 1882, the

C. A. 1885 ELLIS v. ROGERS. Fry, L.J.

Defendant refused to go on with the bargain. The question is whether he was justified in doing so. He relies on two grounds, and first on the want of a license to assign. Without giving a concluded opinion on the point, I may state my present view to be that this defence would not avail him, the time not having arrived when a license was wanted, as the title had not been accepted nor a conveyance tendered.

The Defendant's second defence is that owing to the existence of the restrictive covenants, the Plaintiff cannot make a good title. A purchaser of course has *primâ facie* a right to a good title, and the question is whether here there are circumstances to take away that *primâ facie* right. As the Lord Justice *Cotton* has said, there is a difficulty in ascertaining the principle on which the right rests, nor is it easy to define the circumstances which will prevent its arising. The circumstances of the present case are peculiar. Generally the vendor knows his own title, and the question is how far defects were made known to the purchaser. Here the vendor did not know of the restrictive covenants, the purchaser did know of them, but thought they had been discharged. Both parties therefore were contracting on the footing that a good title could be made, and the case does not come within the exception from the general rule.

Solicitors for Plaintiff: *Deane, Chubb & Co.*
Solicitors for Defendant: *Pedley & Bartlett.*

H. C. J.

PHILLIPS *v.* PHILLIPS.

[1883 P. 180.]

C. A.
1884
V.-C. B.
Feb. 11.
C. A.
1885
Feb. 3.

Will—Leaseholds with Customary Right of Renewal—Devise of Leaseholds for Life, with Remainder over—Renewals by Tenant for Life—Purchase by Tenant for Life of Reversion—Ownership of the Fee.

The doctrine that a renewal of leaseholds by a tenant for life enures for the benefit of the remaindermen applies equally to a purchase of the reversion.

Randall v. *Russell* (1) considered.

Testatrix devised leaseholds, renewable by custom, to *J. P.* for the residue of the term, and after the death of *J. P.*, during the residue of the term, to the children of *J. P.* in equal shares. *J. P.* renewed the leaseholds more than once, and finally purchased the reversion :—

Held, that the fee simple in the property passed by the devise in the will to the children of *J. P.*, and became subject to the trusts of the will.

MOTION FOR JUDGMENT.

Jane Parsons, who died on the 10th of January, 1845, being possessed of a lease granted in July, 1838, by the Bishop of *London* of a house in *Lower Thames Street*, in the city of *London*, for a term of twenty-one years, which would expire on the 3rd of July, 1859, at a rent of £3 a year, by her will dated the 25th of August, 1838, bequeathed as follows :—

"I give and bequeath all that my leasehold house and premises situate No. 87 in *Lower Thames Street*, in the city of *London*, with the appurtenances, unto my said nephew *James Phillips*, to hold to him and his assigns for so much of the term as shall be remaining of the lease thereof, as the said *James Phillips* shall live (subject nevertheless to and charged and chargeable with the payment of" a certain life annuity), "and from and immediately after the decease of the said *James Phillips*, during the continuance of the said lease, then I give and bequeath the said leasehold premises, during the residue of the said term, with the appurtenances, subject to the said annuity . . . unto the children or child of my said nephew, *James Phillips*, then living, to be equally divided between them, if more than one, share and share alike, as

(1) 3 Mer. 190.

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tenants in common." And the testatrix bequeathed "all the residue of" her personal estate to two trustees upon trust to sell and convert, and after payment of debts and legacies, to pay and assign the residue to the said *James Phillips*, if he should survive her.

The will contained no devise of trust estates, supposing any to have been in existence.

The lessee had no right of renewal, but it was customary to grant a new lease for twenty-one years on the expiration of the first seven years of the preceding term upon payment of a fine; and on the 16th of July, 1845, upon the surrender of the then lease, and on payment of a fine of £124 10*s*., the hereditaments were demised by the Bishop of *London* to *James Woods*, sole surviving executor of the testatrix, for a term which would expire on the 3rd of July, 1866, at a yearly rent of £3.

On the 30th of July, 1852, the then existing lease was surrendered, and on payment of a fine of £145 10*s*., the hereditaments were demised by the Bishop of *London* to *Ann Woods*, the legal personal representative of *James Woods*, for a term which would expire on the 3rd of July, 1873, at a yearly rent of £3.

When seven years of the last-mentioned term had expired, the Bishop of *London* refused to grant any further lease, and thereupon the Bishop, in exercise of powers contained in an Act of the 14 & 15 Vict. c. 104, and with the consent of the Church Estates Commissioners, contracted with *Samuel Potter* and *Robert Skeet* (the legal personal representatives of *John Skeet*, the second husband of *Ann Woods*, who survived her) to sell to them the reversion of the Bishop in the premises for £1171; and by a deed dated the 18th of May, 1860, the reversion, estate, and interest of the Bishop of *London* in the premises were, in consideration of £1171 expressed to be paid by *S. Potter* and *R. Skeet*, granted to them the said *S. Potter* and *R. Skeet*, "upon the trusts nevertheless, and to and for the ends, intents, and purposes upon and for which the same ought to be held under or by virtue of the will of the said *Jane Parsons* deceased."

The above fines of £124 10*s*. and £145 10*s*., and the above consideration money of £1171, were in fact paid by *James Phillips*; and by another deed, dated the 18th of May, 1860, in considera-

tion of such payments having been so made, the reversion in the premises was granted and released by *S. Potter* and *R. Skeet* to the said *James Phillips*, his heirs and assigns, upon trust, first, to secure to *James Phillips*, his executors, administrators, or assigns repayment of the said sum of £1171 and interest at £4 per cent.; secondly, to secure to the same so much, if any, of the two sums of £124 10*s.* and £145 10*s.* as the executors or administrators of *James Phillips* might become entitled to in equity as part of his personal estate, "by reason of the said *James Phillips* having been only entitled to the said leasehold premises for his life," with interest at the rate aforesaid; and, subject to the trusts thereinbefore declared, upon trust for "the persons, including the said *James Phillips*, who were or might become entitled to the said messuage, hereditaments, and premises under or by virtue of the said will of the said *Jane Parsons*, in the shares and proportions in which they were or might become entitled thereto under or by virtue of the same will." *James Phillips* also covenanted to indemnify *S. Potter* and *R. Skeet*, and declared that "in the event of his becoming entitled to the fee simple and inheritance of the said hereditaments and premises under or by virtue of the said residuary bequest contained in the said will of the said *Jane Parsons*, or otherwise by virtue of the same will, the said hereditaments and premises should, as between his real and personal representatives, be deemed and considered to be of the nature of real and not personal estate."

Besides paying the above mentioned three sums, *James Phillips* also paid £66 11*s.* 2*d.* for the costs of the last mentioned conveyance.

In 1872 *James Phillips* put up for sale by auction a twenty-one years' lease of the house, and in the conditions of sale it was stated that "the vendor is the freeholder in fee simple of the property."

On the 8th of May, 1877, *James Phillips* died, leaving two children only, sons, and having by will, dated the 7th of October, 1876, after appointing his younger son, *Henry Phillips*, his executor and trustee, and giving several pecuniary legacies, devised and bequeathed all the rest, residue, and remainder of his estate, real and personal, to the said *Henry Phillips* absolutely.

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On the 17th of January, 1883, this action was commenced by *Sarah Elizabeth Phillips*, widow, and *Henry Francis Palmer*, the legal personal representatives of *Henry Phillips*, who died on the 10th of December, 1882, against *Peter William*, the elder son of *James Phillips*.

The statement of claim alleged that when the lease was in 1872 offered for sale, and up to the death of *James Phillips*, it was considered by *James Phillips* that he was absolutely and beneficially entitled to the hereditaments for an estate of inheritance in fee simple, and that upon his death *Henry Phillips*, as residuary devisee, entered into possession of the rents and profits, and continued to receive them until his death; also that since *Henry Phillips*'s death, the Plaintiffs had continued to receive such rents and profits, but that doubts had recently been raised as to whether *James Phillips* was at his death entitled to the hereditaments in fee, or whether, upon a true construction of the will of *Jane Parsons*, and in the events which had happened, he was at his death only entitled to an estate for life, and whether, upon his death, the beneficial interest had not passed to *Henry Phillips* and the Defendant *Peter William Phillips* in equal moieties, subject to the payment of such parts of the four above mentioned sums of £124 10*s*., £145 10*s*., £1171, and £66 11*s*. 2*d*., as would have been chargeable on the premises if *James Phillips* were entitled only to an estate for life therein.

The claim was for a declaration of the rights and interests of the Plaintiffs and the Defendant in the premises, and for alternative relief if the Court should hold *James Phillips* not to have been entitled absolutely and beneficially.

The action was heard before Vice-Chancellor *Bacon* on the 11th of February, 1884.

Horton Smith, Q.C., and *Stallard*, for the Plaintiffs:—

The question turns upon the specific gift in the will in favour of *James Phillips*. The true construction is that this was an absolute gift of the lease to *James Phillips*, liable to be cut down to a life estate only in an event which did not happen—namely, his death "during the continuance of the lease." A gift to a man of so much of a remaining term as he shall live, and

after his death during the continuance of the lease, over—does not create a tenancy for life. In the events that have happened, it is an absolute gift of the whole term—that is to say, an absolute gift of the first lease, and of the renewed lease, and of the inheritance, after the property had become converted.

It is clear from the two deeds of the 18th of May, 1860, that the intention of the parties then was studiously to keep all questions as to their respective rights open.

Hemming, Q.C., and *W. P. Jolliffe*, for the Defendant:—

The testatrix, *Jane Parsons*, having a lease of which fourteen years were unexpired at her death, gives it to *James Phillips* for so much of the term as he shall live, and if he shall die during the continuance of the term, then over. She knew that if *James Phillips* survived the term, there would be nothing for her to give or for him to receive, consequently she could not have intended to dispose of the whole of the property. The interest she intended to create, and did create, was an estate for life in *James Phillips*, with remainder to his children. Then when the lease comes to be surrendered, and a new lease is granted, the new lease has to be treated as having been held by the executors on the same trusts as the original lease. That is what the law declares, as laid down in *Kèech* v. *Sandford* (1), and the cases cited in *White* and *Tudor* (2).

Then came the purchase of the reversion, followed by the conveyance of the 18th of May, 1860, which was still made upon trust for the persons who "might become entitled" under the will of *Jane Parsons*—that is to say, in the events that have happened, for *James Phillips* for life, with remainder to his two children; subject to certain portions (not of the two renewal fines, of which *James Phillips* received the benefit in his lifetime, but) of the purchase-money of £1171, and the other sum for costs, apportioned according to the relative values, on the 18th of May, 1860, of the life estate and the remainder.

The question of whether the will operated only on the first lease, or also upon the subsequent leases and the reversion, does not seem to make much difference, because *James Phillips* in the

(1) Sel. Cas. Ch. 61. (2) 1 Leading Cases in Equity, 46, 47.

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second deed of the 18th of May, 1860, expressly declares that the reversion was to be held upon the same trusts as those expressed by the will of *Jane Parsons*. That is to say, he treats the settlement in the will as an existing settlement. In no other way can any meaning be given to the language of the deed. If the law had not, as we say it has, impressed the trusts of the will on the subsequent leases, and on the reversion, *James Phillips* himself expressly declared those trusts by reference to a settlement which he must have treated as a then subsisting instrument.

Horton Smith, in reply:—

It has been assumed that *James Phillips* was tenant for life, but that is a result which can only be arrived at by a decision on the construction of the will.

BACON, V.C.:—

The question in this case is to be decided on the construction of *Jane Parsons*' will. She was entitled to a lease which was by custom renewable. The gift in *Jane Parsons*' will is of a particular specific thing, namely, a lease. She says [the Vice-Chancellor read the words, and the bequest of the residuary personal estate, and continued:—] Of course I treat with all respect and obedience the cases to which Mr. *Hemming* has referred me in his argument, which, though not very long, was somewhat developed. They involve principles with which we are all familiar, and than which nothing is better established, namely, that where a tenant for life or any other person procures a renewal for life of a leasehold estate, he holds that subject to the trusts and rights applicable to the original lease.

But that is not the question that arises under *Jane Parsons*' will. *Jane Parsons*, being possessed of a lease, of which there is a customary right of renewal, deals with it at first only for the period of the term. Her clear intention is plain from the words of her will. If, therefore, anyone is interested under the will, he is interested in the whole estate that she or any assignee from her might hold for the residue of the term. Besides that, she had a customary right of renewal, and nobody, I think, can deny that this is given by her will devising the residue of the term

either to *James Phillips* or to *James Phillips*' children. The residue of the term is all that she gives specifically, and those who take that residue under the will must be entitled to the customary right. If that be the true construction of the will, it removes all the difficulties in the case. It was a general interest to *James Phillips*, with a customary right during his life. He was at liberty to continue the lease and to extend the term. He paid sums of money on several occasions by way of fine. Application was made to the bishop to have the term prolonged. *James Phillips* availed himself of the power which he possessed, and for his own benefit, and that of no one else, prolonged the lease, and converted the interest in the leasehold estate into an interest in fee simple.

In my opinion, therefore, the bede-roll of cases from *White & Tudor*, with which, I suppose, most of us are reasonably familiar, is beside the question. In my opinion, in the circumstances which have happened, the right of renewal became vested in *James Phillips* for his own benefit. He himself put it up for sale, and he described himself as the owner of the land. In my opinion he was the owner of the land. His ownership and interest arose under the terms of the will, which are, in my opinion, imperative and beyond question; and there is nothing to cut down the absolute interest which was given to him by the will.

There will be a declaration that by the second conveyance of the 18th of May, 1860, and on the true construction of *Jane Parsons*' will, *James Phillips* became absolutely entitled in fee simple to the hereditaments in question; and that under his will and that of *Henry Phillips* it is now vested in the Plaintiffs.

The costs of all parties will come out of the property, unless the Plaintiffs see their way to pay them.

J. B. D.

C. A.

From this judgment the Defendant appealed. The appeal was heard on the 3rd of February, 1885.

Hemming, Q.C., and *W. P. Jolliffe*, for the Defendant:—

The question in the present case is whether a tenant for life who obtained the renewal of a lease and ultimately bought the reversion, bought it for the benefit of himself or for the benefit of

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the trust estate. The lease was of ecclesiastical lands, and it is admitted that it was customary to renew the term. It is a clear rule of equity that if a person having a limited interest in a renewable lease, as tenant for life, renews it in his own name, he will hold as trustee for those entitled in remainder to the old lease: *Keech* v. *Sandford* (1); but it has been left undetermined whether the purchase of the reversion from the lessor by trustees or a tenant for life of a lease, comes within the rule which precludes them from purchasing for their own benefit. In *Randall* v. *Russell* (2) a tenant for life under a will of lands held of a college upon a tenancy from year to year, obtained a lease for fourteen years, and ultimately purchased the reversion in fee from a stranger to whom the college had sold it; and it was held, no doubt, by Sir *William Grant*, that the reversion was not subject to the trusts of the will, on the ground that the college had aliened the property to an individual, that the benefit attending the tenant-right of renewal with a public body was gone, and a lease at rack-rent was all that was to be expected from the private proprietor: but the learned Judge observed (3), that if the tenant for life "had purchased from the college, it might be said, that she thereby intercepted and cut off the chance of future renewals, and, consequently, made use of her situation to prejudice the interests of those who stood behind her; and there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests; although, as I have already said, I am not aware of any decision to that effect." It is submitted that on principle the view suggested by these observations is correct; for if a tenant for life cannot renew a lease except for the benefit of the estate, how can he, by purchasing the reversion, obtain for his own benefit a renewal of his interest for an indefinite time? A further reason why a tenant for life ought to be disabled from purchasing the reversion for his own benefit, is that he obtains the reversion by reason of his interest or estate, although it is limited, in the land; and therefore he is in the same position as a trustee. Vice-Chancellor *Bacon* appears to have decided the present case on the ground that the testatrix

(1) 1 W. & T. L. C. 46, 48. (2) 3 Mer. 190.
(3) 3 Mer. 197, 198.

intended to give to *James Phillips* and his children only the existing term and no further interest; but this view is contrary to the true construction of the will, and inconsistent with the authorities.

Horton Smith, Q.C. (*Stallard*, with him), for the Plaintiffs:—

In this case the reversion was purchased, not by a tenant for life, but by the absolute owner of the term. It is plain from the language of the will that the testatrix intended that if the devisee outlived the expiration of the lease, he was to be the absolute owner of any estate which he might afterwards acquire, and that any subsequent interest belonging to him should not be fettered by the limitations of her will. The original lease would have expired in 1859 if it had not been renewed: the reversion was purchased in 1860, and the devisee did not die until 1877. A mere reference to these dates shews that the reversion is not to be rendered subject to the trusts of the will.

BRETT, M.R.:—

I am unable to agree with the Vice-Chancellor. The will must be construed with reference to the facts which existed at the time when it was made, and which must be presumed to have been known to the testatrix. She was possessed of a term for twenty-one years created by a lease granted shortly before she made her will; her interest was of a somewhat peculiar nature, for the yearly rent was only £3; but it was an ecclesiastical lease, and upon payment of a fine and upon surrender within a limited time it gave a right to renewal. She would, therefore, consider herself to be possessed of a renewable lease, and she must be assumed to have intended to dispose of a renewable lease by her will. It is a well established doctrine of a Court of Equity that the trustee or tenant for life of a lease can renew it only for the benefit of the estate. We are now asked to apply this doctrine to a case where the tenant for life has purchased the reversion. This is, no doubt, an extension of the principle; but I think that it is an extension which we ought to sanction. This appeal must be allowed.

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COTTON, L.J.:—

The question in this case is, who has the right to what was a reversion in property comprised in an ecclesiastical lease. The purchaser of the reversion was *James Phillips;* and under the will of his aunt he had already taken an interest in the property; but it is contended that the interest taken by him under the will was not of such nature as to render the reversion, after it had been bought by him, subject to the trusts of the will; and it has been urged also that the testatrix, being entitled absolutely to the lease, has given it to him absolutely in the events which have happened. At the time when the will was made, the lease had been granted to the testatrix, and the rights of the parties depend upon the words of the will. It is said that the children of *James Phillips* were not to be entitled to any interest in the property, unless he should die during the continuance of the lease. This argument is an ingenious play with words; for it is urged that the gift over to the children was to take effect, only if any portion of the term should remain in existence after his death. The true construction of the will is that *James Phillips* was thereby created tenant for life with remainder over to his children; if no remainder had been declared, the term would have gone over after his death under the residuary bequest: the clause is merely a mode of settling a determinable interest. I think that the words of the will afford strong evidence that this was the intention of the testatrix. No doubt the testatrix in devising the term to *James Phillips* and his children used words of contingency, but words of contingency in a will are often construed as words creating a remainder; it is not a gift to the children in contingency, it is a gift to them after their father's death. During the continuance of the lease *James Phillips* renewed it; he took that new estate by virtue of his interest as tenant for life: if the lease had not been renewed, he would not have taken anything more than a twenty-one years' term, his interest would have lasted as long as the lease but no longer. Then came the subsequent purchase of the reversion: that purchase did not, and could not, make him absolute owner of the house: he was bound to take the house subject to the trusts of the will.

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LINDLEY, L.J.:—

I am of the same opinion. I cannot come to any conclusion different from that at which the other members of the Court have arrived. There must be a declaration that one moiety of the house went to the Defendant and the other to the Plaintiffs' testator subject to an adjustment of the sums chargeable upon the inheritance. The judgment of the Vice-Chancellor must be reversed.

Solicitors for Plaintiffs: *Wellborne & Son.*

Solicitors for Defendant: *Bower, Cotton, & Bower*, agents for *M. Fowden, Altrincham.*

J. E. H.

In re TAMBRACHERRY ESTATES COMPANY.

C. A.
1885
V.-C. B.
Mar. 21.
C. A.
March 25, 26.

Companies Act, 1867 (30 & 31 *Vict. c.* 131) [*Revised Ed. Statutes vol. xv., p.* 623] —*Companies Act*, 1877 (40 & 41 *Vict. c.* 26)—*General Orders, March*, 1868, *r.* 5—*Reduction of Capital*—*Advertisement of Presentation of Petition.*

A limited company whose shares were all fully paid up, having lost part of its capital, presented a petition to reduce the nominal capital by the amount of the loss, reducing the nominal amount of each share from £1 to 12*s.* 6*d.* *Bacon*, V.-C., refused to hear the petition until its presentation had been advertised as prescribed by the 5th rule of the General Order of 1868, made under the *Companies Act*, 1867:—

Held, on appeal, that a petition for reduction of capital authorized by the *Companies Act*, 1877, ought *primâ facie* to be advertised as directed by the General Order of 1868, though the Judge has a discretion to dispense with advertisements if he is satisfied that the interests of creditors cannot be affected by what is proposed, and that as in the present case the Judge in his discretion thought that the petition ought to be advertised, the Court of Appeal would not interfere.

THIS was a petition by the *Tambracherry Estates Company, Limited*, that a special resolution passed on the 5th and confirmed on the 27th of January, 1885, for reduction of the capital of the company might be confirmed by the Court, and that the addition of the words "and reduced" to the company's name might be dispensed with.

The petition stated the incorporation of the company in the

C. A. 1885 *In re* Tambracherry Estates Company.

year 1881 as a company limited by shares under the name of the *Tambracherry Estates and Wynand Gold Mining Company*, with the object of purchasing estates for the cultivation of coffee, tea, cinchona, &c., in the Presidency of *Madras*, and the acquisition and working of gold and other mines in the same Presidency, and that its capital was £160,000 in £1 shares; that the company had issued the whole of its shares, and that they were fully paid up; that the company's gold mining business had been unsuccessful, and that losses had occurred in its coffee planting business; that such losses up to the close of the financial year ending on the 30th of April, 1883, reached the amount of 25 per cent. on the capital; that the directors had resolved to discontinue or suspend the gold mining business, and to propose to the shareholders to alter the name of the company; that a resolution was passed on the 22nd of November and confirmed on the 8th of December, 1883, that the name be changed to the "*Tambracherry Estates Company, Limited*," and that the capital be reduced by five shillings per share, by writing off one-fourth of the capital, "as representing lost capital, and capital not represented by available assets;" that the name of the company was altered accordingly, but that proceedings to reduce the capital were not taken, as it was found that still greater loss was being incurred through the failure of the 1883–4 crop, and that a reduction of 5*s.* per share would not suffice; that the total losses were estimated at £60,000; and that the directors therefore determined to propose instead of a reduction of 5*s.* a share a reduction of 7*s.* 6*d.* a share.

That accordingly by a special resolution passed at the ordinary general meeting of the company on the 5th of January, 1885, and confirmed at an extraordinary general meeting of the company held on the 27th of January, 1885, it was resolved that in lieu of the reduction of 5*s.* per share resolved upon on the 22nd of November, 1883, the capital should be reduced by 7*s.* 6*d.* a share by writing off three-eighths of the present capital "as representing lost capital and capital not represented by available assets."

The petition stated that "the reduction of capital aforesaid does not involve the payment to any shareholder of any paid-up capital, nor any reduction of liability, the shares of the company

being all fully paid up," also that the form of the minute proposed to be registered was as follows:—

"The capital of the *Tambracherry Estates Company, Limited*, is £100,000 divided into 160,000 shares of 12*s.* 6*d.* each, which said shares are fully paid up."

There was no Respondent to the petition.

Heath, for the company:—

It is submitted that the Court will not direct the advertisement of the petition. Ever since the passing of the Act of 1877, the practice of the Court has been to dispense with advertisement in cases where the reduction is in consequence of loss of capital which has been fully paid, see *Seton* on Decrees (1), and so the practice is stated to be in *Palmer's* Company Precedents (2). Some doubt, however, has been cast upon the regularity of this practice by a remark in *Buckley* on the Companies Act (3), and by a decision of Mr. Justice *Chitty* in *In re Consolidated Telephone Company* (4).

If Mr. Justice *Chitty's* order was made on the presentation of a petition for reduction simply on the ground of losses, then the order alters the practice. It was the Act of 1867 that first introduced the subject of the reduction of capital and shares, and under that Act were issued the General Orders of March, 1868, rules 2–20. These rules direct a long series of proceedings to be taken before the fiat permitting the petition to be placed in the list can be issued, involving an expenditure of some six weeks' time, instead of the ordinary brief interval. Amongst these proceedings is the advertisement of the petition, followed by an affidavit as to creditors, notices to creditors, and finally a certificate as to creditors, at the end of eight days from the filing of which the petition may be placed in the list. The whole of these orders were made in the interest of creditors, who are not in any way concerned with the application made to the Court in the present case. Then came the decision in *In re Ebbw Vale Company* (5), in consequence of which the Act of 1877 was passed,

(1) 4th Ed. p. 1462.
(2) 3rd Ed. p. 371.
(3) 3rd Ed. p. 520.
(4) 33 W. R. 408.
(5) 4 Ch. D. 827.

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empowering a company to cancel any lost capital, or any capital unrepresented by available assets. The Act of 1867 applied only to uncalled capital; not to the case of capital paid up and lost. The Act of 1877 remedied this; but it was passed five years after the Orders above-mentioned, and it is submitted that the Act of 1877, whilst it incorporated the Act of 1867, did not incorporate the Orders of 1868; and, in fact, the Orders of 1868, so far as they require advertisement, have never since 1877 been applied to petitions for reduction by reason of lost capital—a case in which creditors cannot possibly be interested. The case before Mr. Justice *Chitty* is not fully reported, and may have involved some question of the return of capital, rendering an advertisement necessary. It does not, therefore, necessarily govern this case.

BACON, V.C.:—

I have listened for nearly half an hour to an elaborate and learned argument, going through the labyrinth of these Acts and Orders, and referring me to the decision of Mr. Justice *Chitty* in the case that has been cited. Upon that state of things I have no doubt whatever that the advertisement ought to be published. I decide this upon general principles. Shareholders are interested in this question—creditors are interested—and it is, of all things, necessary that the petition should be advertised. I say this without reference to the merits of the petition. I do not suggest there is anything wrong in it. The petition will stand over, with liberty to advertise.

J. B. D.

The company appealed from this decision, and the appeal was heard on the 25th of March, 1885.

Heath, for the company:—

The reduction of capital was first introduced by the *Companies Act*, 1867 (30 & 31 Vict. c. 131), under which were made the General Orders of March, 1868, which regulated the proceedings that had to be taken, and required the issue of advertisements, and imposed various conditions for the benefit of creditors. Under

this Act it was held in the case of *In re Ebbw Vale Company* (1) that there was no jurisdiction to authorize a company, whose paid-up capital had been partially lost, to write off that loss by reducing the nominal amount of its shares. This led to the passing of the *Companies Act*, 1877 (40 & 41 Vict. c. 26). This Act clearly authorizes the cancelling of lost capital. The object of the advertisement was to enable creditors to object, and as they cannot be prejudiced by what is proposed in the present case, an advertisement is unnecessary. As regards shareholders they are bound by the special resolutions, and cannot object. They have no *locus standi* to oppose, and by sect. 4 of the last mentioned Act, as what is proposed does not involve the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital, the creditors cannot object without the leave of the Court. The common form of order on these petitions is given in *Seton* on Decrees (2), and it does not appear to have been usual to advertise them (3), and they have always been answered on the ordinary two days' fiat. The case of *In re Consolidated Telephone Company* (4) is very concisely reported, and there may have been special circumstances, but if not it seems to reverse the policy of the last Act by requiring notice to persons who have not, except by special leave of the Court, any right to object. The Act of 1877 ought not to be held to incorporate the rules of 1868. The consequences of doing so would be most burdensome. The rules as regarded advertisements were applicable only to proceedings under the former Act, where every creditor had a right to object. Now he can only object by leave of the Judge.

[COTTON, L.J.:—Does not the Act mean that the Judge is to satisfy himself whether the reduction can affect creditors?]

That should be decided at the hearing of the petition.

[COTTON, L.J.:—Ought not the creditors to have an opportunity of shewing at the hearing, if they can, that their interests will be affected?]

(1) 4 Ch. D. 827.
(2) 4th Ed. p. 1462.
(3) Seton, 4th Ed. p. 1465.
(4) 33 W. R. 408.

C. A. 1885 *In re* TAMBRACHERRY ESTATES COMPANY.

March 26. COTTON, L.J. :—

This is an appeal from a refusal of Vice-Chancellor *Bacon* to hear a petition for the reduction of the capital of a limited company, until it had been advertised as prescribed by the General Orders of March, 1868. The company urges that this is a case where it is not necessary to issue advertisements, that there is no rule in force which makes it obligatory to direct them, and that the Judge had a discretion whether they should be directed, and that, as they are unnecessary, they ought not to be directed.

We must, then, consider the Acts. The *Companies Act*, 1867, was the first which gave a company power to reduce its capital, and it was decided that under that Act "capital" did not include paid-up capital, so as to enable a company which had lost part of its paid-up capital to reduce its nominal capital by the amount of the loss. The Act of 1877 was passed to remedy this. Before considering the latter Act, let us look at the General Order under the former Act. The 5th rule directs that notice of the presentation of the petition shall be published at such times and in such newspapers as the Judge shall direct, so that the first insertion of such notice be not less than one calendar month before the day of the date with reference to which the list of creditors is to be made out. Rule 16 provides that before the hearing of the petition notices stating the day on which the same is appointed to be heard shall be published at such times and in such newspapers as the Judge shall direct, and the rules require a list of creditors to be made out so that it may be known who are the creditors entitled to oppose. These rules apply to all petitions for reduction of capital under the Act of 1867. Then the Act of 1877 recites that doubts have been entertained whether the power given by the Act of 1867 to a company of reducing its capital extends to paid-up capital, and that it is expedient to remove such doubts, and by sect. 2 it is enacted that this Act, so far as is consistent with the tenor thereof, shall be construed as one with the *Companies Acts*, 1862 and 1867. The Act of 1877 is not, then, an independent Act, but is to be read with and as part of the Act of 1867. Then, sect. 3 provides that the word "capital," as used in the *Companies Act*, 1867, shall include paid-up capital, and

that the power to reduce capital conferred by that Act, shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company. This is a petition on the ground that capital has been lost by depreciation of the value of the company's assets. It is a petition under the Act of 1867, though it is one which can only be presented by virtue of the Act of 1877, but, as it is under the former Act, the rules made under that Act must apply to the proceedings under it, subject to this, that where the rules require something to be done which is inconsistent with the later Act, they so far do not apply. It is argued that, here, the rule requiring a month's advertisement is inapplicable. This was rested on sect. 4 of the Act of 1877. The first part of that section is unnecessary, and was probably introduced only for the sake of the proviso "that where the reduction of the capital of a company does not involve, either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital, the creditors of the company shall not, unless the Court otherwise direct, be entitled to object or required to consent to the reduction." It was argued that the rules as to advertisements were only for the purpose of seeing who were the persons that could object, that, here, creditors could not object unless the Court gave them leave, and that, therefore, the general rule as to advertisements was inappropriate, and advertisements ought not to be directed unless it was made out that creditors might be affected by the reduction. I do not agree with this. Who is to make out that creditors may be affected if no notice is given to any one who can appear on their behalf. Take this case, suppose the capital diminished by the depreciation of assets and a reduction of capital made. If the assets then recovered their value, the difference would be profit which could be divided among the shareholders by way of dividend. This would certainly be a prejudice to creditors, since they would not have so large an estate to look to as if there had been no reduction of capital. I think that the Judge has a discretion, and that if he is satisfied that creditors cannot possibly be affected by the reduction he may dispense with advertisements. It is impossible for us to say that the Judge had not a discretion to require adver-

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tisements if he thought proper, and if he thought that creditors might possibly be affected, I do not see how he could exercise his discretion otherwise than he did. At all events I can see no reason for saying that he exercised it wrongly. The rules of 1868 in my opinion, apply, subject to the discretion of the Judge to dispense with advertisements when he is of opinion that creditors cannot possibly be affected. *Primâ facie* I think that a petition, authorized by the Act of 1877 is to be advertised, but the Judge may dispense with the advertisements where he considers that the creditors have clearly no *locus standi*.

BOWEN, L.J.:—

I agree with every word of the judgment of Lord Justice *Cotton*.

FRY, L.J.:—

I agree that the Vice-Chancellor had a discretion, and that we ought not to interfere with his exercise of it. Whether, if I had been in the place of the Vice-Chancellor, I should have ordered advertisements, I do not say. I am not clear that sect. 4 does not render them inappropriate, but I do not dissent from the judgment of the other members of the Court.

The company afterwards took out a summons for directions, and directions were given that advertisements should be issued, informing creditors that the petition would be in the paper on a certain day (being the first petition day after the expiration of eight days from the appearance of the advertisements) when any creditor who desired to object might attend and be heard. The advertisements were issued, and on the day named the petition came on for hearing. No creditor appeared, and Vice-Chancellor *Bacon* made an order confirming the reduction.

Solicitors: *Oehme & Summerhays.*

H. C. J.

In re YOUNG & HARSTON'S CONTRACT.

V.-C. B.
1885
March 13.

[1884 Y. 241.]

Vendor and Purchaser—Interest—Mistake—Repayment—Summons—Jurisdiction—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 9 [*Revised Ed. Statutes, vol. xvii. p.* 289].

A purchaser who has, under his contract, erroneously paid the vendor interest on the purchase-money cannot recover it by summons under sect. 9 of the *Vendor and Purchaser Act*, 1874, but must proceed by action in the ordinary way.

ADJOURNED SUMMONS.

A question raised by this summons was whether a purchaser who has paid interest on his purchase-money to the vendor under the contract can, on the ground that it was wrongly paid, proceed to recover it from the vendor by summons under the *Vendor and Purchaser Act*, 1874.

On the 10th of July, 1884, *Christopher Harston* and others entered into a contract with *John Young* for the purchase of a freehold estate in *Kent*, and paid the usual deposit. The contract contained a condition that the purchase should be completed on the 8th of September, 1884, and that if from any cause whatever, other than wilful default on the part of the vendor, the completion of the purchase should be delayed beyond that day, the remainder of the purchase-money should bear interest at 5 per cent. per annum from that day up to the day of payment.

The purchase was not completed by the stipulated day, and on the 27th of September the purchasers' solicitors wrote to the vendor's solicitors expressing a "hope that they would not require interest as the purchase-money was ready to be paid on the 8th of September, and particularly as the estate was in hand, and no income was recoverable from it." The vendor's solicitors, however, declined to waive interest.

On the 14th of October following the purchasers' solicitors wrote to the vendor's solicitors charging them with delay in completion, and stating that if interest was insisted on, they should submit the question to the Court, and "should you decline to

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complete without receiving interest on the balance of the purchase-money our clients will, for the sole purpose of obtaining possession of the property, pay the interest under protest and without prejudice to the contemplated proceedings and to our clients in every respect." On the same day the purchase was completed, the purchasers paying the balance of their purchase-money together with interest to that date, which the vendor's solicitors again declined to waive.

This summons was then taken out by the purchasers asking that the vendor might be ordered to return to them the interest they had so paid.

Grosvenor Woods, for the purchasers, contended that on the facts the vendor had been guilty of "wilful default," or at least negligence, and that therefore he was not entitled to retain the interest.

[Bacon, V.C.:—Why did you not bring an action to recover the money?]

We have adopted the least expensive course in proceeding under the *Vendor and Purchaser Act*, 1874, sect. 9 of which enables the vendor or purchaser to apply in a summary way to the Judge in Chambers in respect of "any question arising out of or connected with the contract." I do not understand that any objection will be raised on the ground of jurisdiction.

Marten, Q.C., and *Northmore Lawrence*, for the vendor, were not called upon.

Bacon, V.C.:—

The question I have asked remains unanswerered. Why did not the purchasers bring an action to recover this interest? The *Vendor and Purchaser Act* has not altered the law that if one man pays a sum of money to another who is not entitled to receive it, he must proceed to recover it by action: that is the law, and I cannot alter it. Here, according to the contract, in a certain event the purchasers had to pay interest on their purchase-money: they paid it, and now they say they paid it in their own wrong. Perhaps they did; but that gives them no right to recover it back again by a proceeding of this kind.

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It is unnecessary for me to go into the other part of the case argued with so much care and skill by Mr. *Grosvenor Woods*, though I am by no means satisfied that there has been such wilful default on the part of the vendor as the purchasers can complain of. It is sufficient for me to say that I have no right to order money to be paid back upon an application under the *Vendor and Purchaser Act*.

This summons has been taken out under a total misapprehension of the law, and must therefore be dismissed with costs.

Solicitors: *Crosley & Burn: Hollams, Son, & Coward.*

G. I. F. C.

V.-C. B.
1885
March 31.

In re DOCWRA.
DOCWRA *v.* FAITH.

[1883 D. 821.]

Married Woman—Trust for Sale—"Bare Trustee"—Administration Action—Order for Sale—Conveyance—Acknowledgment—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *ss.* 77, 79 [*Revised Ed. Statutes, vol. vii., p.* 511]—*Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 6 [*Revised Ed. Statutes, vol. xvii. p.* 289].

A testator devised his real estate to trustees for sale, who were married women, one of them having married before and the other after the *Married Women's Property Act*, 1882. Both of them also took beneficial interests in the proceeds of sale. Under the judgment in an action for the administration of the testator's estate, part of the real estate was sold by the trustees, the purchaser paying his purchase-money into Court:—

Held, that the married women were "bare trustees" within sect. 6 of the *Vendor and Purchaser Act*, 1874, and that the conveyance to the purchaser did not require the concurrence of the husbands, or acknowledgment under the *Fines and Recoveries Act*.

ADJOURNED SUMMONS.

Thomas Docwra, who died on the 27th of July, 1882, by his will, dated the 8th of July, 1882, devised his real estate to his daughters *Mary Ann Faith*, the wife of *John Faith*, and *Elizabeth Panton*, widow, upon trust for sale, each of the daughters taking under the will a share of the proceeds of sale. Mrs. *Faith* was

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married on the 31st of October, 1867, and Mrs. *Panton* married *Edward Dewing Kittoe* on the 2nd of January, 1883.

The action was for the administration of the testator's estate, and by the judgment, dated the 1st of June, 1883, the real estate was ordered to be sold. Accordingly the property was put up for sale by the trustees by auction in lots, some of which were purchased by *Thomas Fever Gandar*, who thereupon paid his purchase-money into Court.

In preparing the conveyance, the question arose whether Mrs. *Faith* and Mrs. *Kittoe* should acknowledge the deed under the *Fines and Recoveries Act*.

The purchaser thereupon took out this summons to have the conveyance settled by the Judge, and the question decided whether acknowledgment by the married women was necessary.

Upon the matter coming before the Chief Clerk he held that, having regard to the married women being mere trustees for sale, their acknowledgment was unnecessary.

The summons was ultimately adjourned into Court, and now came on for hearing.

Vernon R. Smith, for the purchaser:—

The first question is whether these two ladies are "bare trustees" within the meaning of sect. 6 of the *Vendor and Purchaser Act*, 1874, which enacts that "when any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*." I submit they are not. A "bare trustee" is a trustee having no active duties to perform in relation to the trust estate: *Christie* v. *Ovington* (1); or having no beneficial interest in the trust estate: *Morgan* v. *Swansea Urban Sanitary Authority* (2). In the present case these ladies have both duties as trustees and also beneficial interests.

The next question is whether Mrs. *Kittoe*, who was married since the *Married Women's Property Act*, 1882, is affected by that Act, so far as regards any disposition by her of her trust estate. I submit that there is no section in the Act applicable to her case. The only section relating in terms to a married woman

(1) 1 Ch. D. 279. (2) 9 Ch. D. 582.

who is a trustee is the 18th, but the trust property which she is thereby empowered to dispose of is confined in terms to personal estate, such as annuities, stocks and shares. Sects. 2 and 5, dealing with the property of women married before or after the Act, relate to beneficial interests only. These ladies therefore, not being "bare trustees" of the real estate in question, and neither of them coming within the provisions of the *Married Women's Property Act*, 1882, must acknowledge the conveyance in the ordinary way under the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), s. 77.

E. Beaumont, for the vendors:—

The *Fines and Recoveries Act* only applies to married women who are beneficial owners, and is intended to protect married women who have beneficial interests against the coercion of their husbands. Here the married women are trustees, having no duty to perform except to convey under the order of the Court, which they can be compelled to do. They are therefore "bare trustees" within sect. 6 of the *Vendor and Purchaser Act*, 1874, as explained by *Christie* v. *Ovington* (1). *Morgan* v. *Swansea Urban Sanitary Authority* (2) is a different case, for there the vendor had let the purchaser into possession before payment of the purchase-money, and by reason of his having a lien on the property for the purchase-money he was held not to be a "bare trustee." Then, as regards Mrs. *Kittoe*, I rely also upon the comprehensive terms of sect. 1, sub-sect. 1, of the *Married Women's Property Act*, 1882, which enacts that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." The words are sufficiently extensive to include trust property: *Wolstenholme* on the *Conveyancing Acts* (3). Sects. 2 and 5 only fix the rights of the wife as between herself and her husband. The extra-enabling clause, sect. 18, is not to be read as cutting down the previous wide terms of sect. 1.

(1) 1 Ch. D. 279. (2) 9 Ch. D. 582.

(3) 3rd Ed. p. 148.

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I submit therefore that both these ladies are "bare trustees" within the meaning of sect. 6 of the *Vendor and Purchaser Act*, 1874, and that at all events Mrs. *Kittoe* is able to convey under the *Married Women's Property Act*, 1882, without the intervention of her husband.

Vernon R. Smith, in reply.

BACON, V.C.:—

This case appears to me to be free from doubt. The Court has taken upon itself the administration of an estate, and has ordered a sale of the real estate. The trustees, who are married ladies, propose to execute a conveyance without acknowledgment under the *Fines and Recoveries Act*. In my opinion such a conveyance is perfectly good. These ladies are bare trustees having no duty to perform except to obey the order of the Court. They are parties to the action; their beneficial interests are bound by the judgment that has been made; and only as trustees are they to convey. The duty of the Court is to quiet the purchaser in his conveyance. If then these ladies were unable or unwilling to convey, the Court might make a vesting order; but in my opinion the judgment of the Court binds these two ladies, and the purchaser will obtain a good title under an ordinary conveyance made by them without the concurrence of their husbands, and without any acknowledgment. I will therefore express my opinion upon this summons, that under the judgment the two ladies were constituted bare trustees within the meaning of the *Vendor and Purchaser Act*, 1874, sect. 6, and that acknowledgment by them under the *Fines and Recoveries Act* is unnecessary. The purchaser will pay the costs of the summons.

Solicitors: *E. B. & H. Squire; Munns & Longden.*

G. I. F. C.

In re HIGGINS. DAY *v.* TURNELL.

[1884 H. 4404.]

V.-C. B.
1885
April 17.

Settlement—Covenant by Settlor for Payment of a Sum of Money during his Life or after his Death—"Free from all deductions"—Whether Succession Duty or Legacy Duty payable—Succession Duty Act (16 & 17 *Vict. c.* 51), *ss.* 1, 42, 44 [*Revised Ed. Statutes, vol. xi. pp.* 595, 604, 605]—*Legacy Duty Act* (36 *Geo.* 3, *c.* 52), *s.* 6 [*Revised Ed. Statutes, vol. iii. p.* 401].

By a post-nuptial settlement the settlor, the wife's father, covenanted with the trustees for payment to them during his life, or within twelve calendar months after his death, of the sum of £10,000, "free from all deductions whatsoever," and an annuity of £200 in the meantime. On the death of the settlor his executor paid the full £10,000 to the trustees:—

Held, that succession duty on the £10,000 was payable by the trustees and not by the executor.

Adjourned Summons.

By an indenture of settlement dated the 5th of May, 1879, and made between *William Day* of the first part, *John Day* of the second part, *William Wilcox* and *Walter Codd* (the trustees) of the third part, and *Henry Higgins* of the fourth part; after reciting (amongst other things) the marriage of the said *John Day* (the son of the said *William Day*), and *Ellen* his wife (the daughter of the said *H. Higgins*), and that the said *H. Higgins* had agreed to enter into a covenant to pay, within twelve calendar months from his death, to the said trustees the sum of £10,000 upon trust to be settled in favour of the said *Ellen Day*; the said *H. Higgins* covenanted with the trustees in the following terms:

"The said *Henry Higgins* doth hereby for himself, his heirs, executors and administrators, covenant with the said *William Wilcox* and *Walter Codd*, their executors, administrators and assigns, that he, the said *Henry Higgins*, will at such time or times during his life as he shall think fit, or within twelve calendar months after his death, pay to the said *William Wilcox* and *Walter Codd*, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of

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these presents, the sum of £10,000 sterling, free from all deductions whatsoever; and further that in the meantime, and until the said sum of £10,000 shall have been so paid as aforesaid, the said *Henry Higgins*, his heirs, executors and administrators, will pay to the said *William Wilcox* and *Walter Codd*, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents, the clear yearly annuity of £200 by equal quarterly payments." Then followed trusts of the £10,000 and the annuity for the benefit of Mr. and Mrs. *John Day* and their issue.

Henry Higgins died on the 3rd day of August, 1881, having made his will, of which the Defendant was the sole acting executor. The £10,000, not having been paid by *Henry Higgins* in his lifetime, was paid out of his estate after his death to the Plaintiffs, the then trustees of the settlement, in June, 1883.

The question, raised by originating summons, was whether the succession duty upon the £10,000 was payable out of *Henry Higgins'* estate or out of the settled fund itself.

Marten, Q.C., and *Dunham*, for the Plaintiffs, the trustees of the settlement:—

It is clear that the duty must be paid by Mr. *Higgins's* executor, as the covenant is to pay the £10,000 "free from all deductions whatsoever." Mr. *Higgins* did not exercise the option of paying the money during his life, but paid the annuity of £200 to the settlement trustees, being 2 per cent. on the capital sum. If the money had been paid in his lifetime no duty would have become due. Succession duty is a "deduction," and there would be a breach of the spirit and substance of the covenant, though perhaps not of the letter, if, after receiving the full £10,000 the trustees had to deduct and pay the duty. The case is analogous to that of *In re Bannerman's Estate* (1), where there was a gift of annuities to the testator's widow "free from all deductions," and it was held by *Hall*, V.C., that the annuitant was entitled to the annuities without deduction of income tax, and arrears of income tax deducted were ordered to be repaid.

(1) 21 Ch. D. 105.

Millar, Q.C., and *W. N. Lawson*, for the Defendant, the executor:—

The covenant having been fulfilled and the money paid in full the liability for duty falls by law upon the recipients. Succession duty is a "charge" on the property in the hands of the successor, and differs in this respect from legacy duty, which is a "deduction."

By the *Legacy Duty Act*, 36 Geo. 3, c. 52, s. 6, the duty on a legacy must be deducted by the executor before payment, and non-deduction makes the executor personally liable; but succession duty is only a debt charged on the succession, which the executor has no power to deduct. Sect. 42 of the *Succession Duty Act* (16 & 17 Vict. c. 51) says, "The duty imposed by this Act shall be a first charge on the interest of the successor, and of all persons claiming in his right .... while the same (the property) shall remain in the ownership or control of the successor, or of any trustee for him .... and the said duty shall be a debt due to the Crown from the successor." Then the 44th section enumerates the persons who are personally accountable for the duty. They are accountable "to the extent only of the property or funds actually received or disposed of by them," and include "every trustee, guardian, committee, tutor, or curator, or husband."

[*Marten*:—"Trustee" includes "executor."]

But not the executor of the person who pays, but of the person who receives.

[BACON, V.-C.:—Are you sure the succession duty is payable? I cannot decide that question in the absence of the Crown.]

Millar:—That is agreed upon between us.

Marten, in reply:—

Sect. 44 expressly makes this executor responsible. The interpretation clause in sect. 1 makes "trustee" include "executor or administrator." The 42nd and 44th sections, taken in connection with sect. 1, clearly produce the same effect as under the *Legacy Duty Act*. The real question is, what is the true construction of the covenant? Its words are quite large enough, independently of the construction of sects. 42 and 44, to throw the burden of paying the duty on Mr. *Higgins's* executor.

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BACON, V.-C. :—

I do not think there is any difficulty in the particular question which is submitted to me. I avoid saying anything about the £10,000 in the hands of the trustees being liable to succession duty. That question I am told is settled. That may be so. At all events I have not the power of deciding it here, nor is the question properly raised before me.

The difference between a legacy and a succession is perfectly obvious and palpable. The covenant in the deed creates a debt. It is, in other words, this: "I, the settlor (the father of the lady), covenant with you, the trustees, that I will pay £10,000 as mentioned in the settlement. I will reserve to myself the right to say when I shall pay it, and if I pay £200 a year you shall not for a certain time call for payment of the £10,000." But whenever the trustees do call for it, it is not a legacy; it is not a thing from which the *Legacy Duty Act* permits any deduction to be made. It is a debt—a debt payable—a thing totally different from a legacy. If the deed had been a bond it would have had the same effect. It is the same as a separate instrument in the shape of a bond imposing an obligation upon an executor to pay a debt out of the testator's estate. There is no power in the executor to deduct anything. An executor cannot deduct from a legacy anything except the legacy duty, which is levied by the law upon the legacy. He acquits the duty which the testator took upon himself when he said, "I will pay £10,000;" and the executor pays £10,000.

If we look into the merits of the case, it comes to this. Supposing the testator had said, "I give you £10,000, but I will keep it as long as I like, and when I like I will pay it, but not until I like. When I pay it to you I will pay you £10,000 without deduction." That takes away from it the character of legacy, or of any *post mortem* obligation, except the obligation which every man is under, or his estate is under, to pay the debts which he owes. I must consider the trustees knew perfectly well, when Mr. *Higgins* entered into this contract with them, that if he paid the money in his lifetime they should have it without deduction, and that if he failed to pay it to them in his lifetime, and it was paid after his death, they should also have it without

deduction. The case then comes under the law of succession duty and not the law of legacy duty. The *Succession Duty Act* says that whenever trustees shall succeed to anything, they, the trustees, out of what they receive, shall pay the succession duty, which is a fiscal obligation imposed by the statute. Legacy duty and succession duty are two things wholly separate and distinct. If this money had been a legacy, no doubt the executor ought to have paid the duty; but it is not a legacy, and there is no right by law to deduct anything from it. The testator was under an obligation to pay the money, and he has paid it. What becomes of it after he has paid it is a question to be settled between the "successors" and the Government. The Government have a right to say, "You, the successors, shall pay us the succession duty." That is wholly irrespective of the testator's estate; it has nothing to do with the testator's estate. The Government do not say, "Pay us out of the testator's estate," but "Pay us out of the money you hold in your hands. The Act says succession duty is payable, and you must pay it."

I cannot entertain any doubt as between the two estates, if I may so call them. The estate of the testator was bound to pay £10,000, neither more nor less; and that obligation has been discharged by the payment of £10,000. What becomes of it is quite another thing.

Marten:—Does your Lordship make an order as to costs, this being a new point.

BACON, V.-C.:—I make no order as to costs.

Solicitors: *Pritchard & Marshall*; *J. H. Johnson.*

G. I. F. C.

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March 4, 5, 6, 13.

ARDEN *v.* ARDEN.

[1879 A. 57.]

Mortgage—Real Estate in Middlesex—Share in Proceeds of Sale of—Priority—Registration in Middlesex—Middlesex Registry Act (7 *Anne, c.* 20), *s.* 1 [*Revised Ed. Statutes, vol. ii., p.* 200]—*Notice to Trustees—Equitable Execution.*

The local Registry Acts are intended to apply only to dealings at law or in equity with the land itself. Accordingly, an incumbrancer upon a share in the proceeds of real estate in *Middlesex* devised in trust for sale obtains no priority over other incumbrancers on such share by registering his mortgage deed, and the priorities of such incumbrancers rank according to the dates of their respective notices to the trustees.

Malcolm v. *Charlesworth* (1) approved.

Although formal notice to the trustee of the proceeds of real estate devised in trust for sale or of a *chose in action*, of an incumbrance thereupon does not give priority over an earlier incumbrance of which the trustee may have obtained accidental notice, the converse proposition that incumbrances are to rank not in the order of notices given by the incumbrancers but of accidental knowledge obtained by the trustees, does not hold good.

A judgment creditor cannot, by giving notice to the trustee, put himself in a better position than the judgment debtor; and a judgment creditor who has obtained equitable execution by the appointment of a receiver subject to existing incumbrances was held to have obtained no priority by giving notice of the appointment to the trustee of the judgment debtor.

Adjourned summons.

Joseph Arden, by will dated in 1818, devised certain real estate, the bulk of which was situated in *Middlesex*, to trustees in trust for his wife for life, with remainder to his son *Joseph* for life, and after the death of *Joseph* leaving a child or children in trust to sell and divide the proceeds among such children on attaining twenty-one. The testator died in 1881; his widow was the surviving trustee and executrix. She died on the 20th of November, 1883. On the 30th of January, 1879, *Joseph Arden*, the son, died leaving several children, of whom *Frederick Arden* was one. *Frederick Arden* effected various incumbrances upon his share under the will of the testator, amongst which were two mortgages in favour of *John Pike* and *Alexander Howden*, as trustees of

(1) 1 Keen, 63.

the *Reliance Life Assurance Society*, dated respectively in July and August, 1877.

In this action, which was instituted early in the year 1879 against the trustees for the administration of the trusts of the will of *Joseph Arden*, the father, an inquiry had been directed as to the incumbrances on *Frederick Arden's* share under his grandfather's will, and as to the respective priorities of such incumbrances.

In answer to this inquiry the Chief Clerk, on the 26th of November, 1884, certified that there were nine sets of incumbrancers, and in certifying the priorities of such incumbrances he placed Messrs. *Pike* and *Howden* last.

There was no dispute as to the priority of the incumbrancers who were placed first and second, but Messrs. *Pike* and *Howden* took out a summons that the certificate might be varied by placing their incumbrances third instead of ninth in numerical order of priorities, and upon the hearing of the summons three questions were argued: first, whether the applicants were entitled to priority over all the other incumbrancers coming after Nos. 1 and 2 by reason of their having been the first to register their incumbrances in *Middlesex* under the statute of 7 Anne, c. 20; secondly, whether they were entitled to such priority upon the ground of notice; and, thirdly, whether an incumbrancer who had been placed seventh on the list, and who was a judgment creditor who had obtained equitable execution by the appointment of a receiver subject to existing incumbrances, and had given notice to the trustees of such appointment, had thereby obtained priority over the applicants whose incumbrances were prior in point of time and subsequent in point of notice.

The case made by the applicants upon the second question is fully stated in the judgment of the Court, and was shortly as follows:—The applicants did not, as they admitted themselves, give any formal notice of their incumbrances to the trustees of the will before the 21st of July, 1880, on which day they filed an affidavit in the action stating their incumbrances, but they maintained that the trustees had in fact obtained a knowledge of their incumbrances from a letter written on the 25th of July, 1879, not by themselves or their solicitors, but by the solicitors of the

[KAY, J. 1885 ARDEN v. ARDEN.

Plaintiffs in the action to the solicitors of the Defendants, the trustees, in which the applicants were mentioned by name as being incumbrancers, and also from a correspondence in March, 1879, between the then solicitors of the applicants and the solicitors of the trustees, in which the former mentioned that they were instructed for mortgagees of *Frederick Arden*, without giving the names of such mortgagees, or any further information.

Hastings, Q.C., and *Begg*, in support of the summons to vary:—

The applicants, who are legal mortgagees, have by registering their mortgage deeds in *Middlesex* obtained priority over all the incumbrancers who neglected to do so, and are entitled to rank third instead of ninth.

[KAY, J. referred to *Le Neve* v. *Le Neve* (1)].

The words of the *Middlesex Registry Act*, 7 Anne, c. 20, s. 1, are the widest possible, and require the registration of every deed by which any hereditaments in *Middlesex* "may be in any way affected in law or in equity." So that even if the lands are affected in a roundabout way, the deed is within the statute. An interest in the moneys to arise from the sale of real estate requires an acknowledged deed to pass it in the case of a married woman: *Briggs* v. *Chamberlain* (2).

They were then stopped by the Court.

Robinson, Q.C., and *W. D. Rawlins*, for Mr. *A. Rickards*, the incumbrancer placed third on the list:—

The interest of the applicants is in the proceeds of the sale of the lands in *Middlesex*, when that sale takes place; and this is an interest not in land but in money. If *Frederick Arden* had died intestate his share would have gone to his next of kin and not to his heir-at-law. Such an interest is not within the scope of the Registration Acts, and the applicants have gained no priority by registration. It is a *chose in action*, and the rule applies that "the party who first makes himself master of a *chose in action* by giving notice" obtains the priority: *Lee* v.

(1) 3 Atk. 646. (2) 11 Hare, 69.

Howlett (1); *Wilmot* v. *Pike* (2); *Re Hughes' Trusts* (3); *Malcolm* v. *Charlesworth* (4).

D. L. Alexander, for the *English and Scottish Law Life Assurance Association* and the *Scottish Union National Assurance Association* being respectively incumbrancers No. 4 and No. 7:—

The object of the Registration Acts was to prevent purchasers or mortgagees of lands from being prejudiced by secret dealings with the land itself, and an interest like this is not within their purview. The trustees for sale could make a perfectly good title to a purchaser, and if so, why should an assignment of *Frederick Arden's* interest be registered?

Upon the question of notice he referred to *Coote* on Mortgages (5).

Swinfen Eady, for *C. J. Abbot*, whose incumbrances ranked No. 6 and No. 8.

Hastings, Q.C., and *Begg*, were then again called upon to argue:—

Malcolm v. *Charlesworth* is no longer law. Moreover it is distinguishable, being the case of a legacy charged upon land, while this is a share in the proceeds of land devised in trust for sale—an interest which could not be bequeathed to a charity; and which in the case of a married woman would not pass except by deed acknowledged under the *Fines and Recoveries Act: Franks* v. *Bollans* (6). In *Lee* v. *Howlett* the land was not in a register county. Here it is, and, having registered, notice by us was not necessary. But in fact the trustees did acquire notice of our incumbrances by the letter of 25th of July, 1879, and also by the correspondence of March, 1879. Express notice direct from the incumbrancer is not necessary, it is enough if "the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance . . . so that a reasonable man, or an ordinary man of business, would act upon

(1) 2 K. & J. 531.
(2) 5 Hare, 14.
(3) 2 H. & M. 89.
(4) 1 Keen, 63.
(5) 5th Ed. p. 833.
(6) Law Rep. 3 Ch. 717.

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the information, and would regulate his conduct by it in the execution of the trust:" *Lloyd* v. *Banks* (1); *Buller* v. *Plunkett* (2); *Ex parte Knott* (3); *Foster* v. *Cockerell* (4); *Coote* on Mortgages (5). Notice to one trustee is notice to all: *Browne* v. *Savage* (6); and notice to Mr. *Johnson*, the solicitor, as agent for the purpose, was sufficient: *Rossiter* v. *Miller* (7).

Then as to incumbrance No. 7, a judgment creditor who has obtained equitable execution by the appointment of a receiver, "subject to existing incumbrances," is not in the position of a purchaser, and cannot obtain priority by means of notice to the trustees of the appointment of such receiver. He must take subject to all prior equities: *Scott* v *Lord Hastings* (8).

D. L. Alexander, for incumbrancers Nos. 4 and 7:—

Our security was completed by notice.

[KAY, J., referred to *Whitworth* v. *Gaugain* (9)].

That was the case of an equitable mortgage of lands, here the subject matter is a *chose in action*.

Swinfen Eady, for incumbrancers Nos. 6 and 8:—

A garnishee cannot get priority over any incumbrances prior in date to his garnishee order by giving notice to the trustees or others that the garnishee order has been made: *Pickering* v. *Ilfracombe Railway Company* (10); *Robinson* v. *Nesbitt* (11). The execution creditor cannot obtain anything more than the execution debtor is legally and equitably entitled to.

Hornell, for the Plaintiff.

Hastings, in reply.

KAY, J.:—I will consider this case.

(1) Law Rep. 3 Ch. 488, 490.
(2) 1 J. & H. 441.
(3) 11 Ves. 609.
(4) 3 Cl. & F. 456; 9 Bli. 332.
(5) 5th Ed. p. 833.
(6) 4 Drew. 635.
(7) 3 App. Cas. 1124.
(8) 4 K. & J. 633.
(9) 3 Hare, 416.
(10) Law Rep. 3 C. P. 235.
(11) Law Rep. 3 C. P. 264.

1885. March 13. KAY, J.:—

The first question is whether an interest in a share of the proceeds of real estate in *Middlesex* devised in trust for sale is within the *Middlesex Registry Act*, 7 Anne, c. 20. The words of the Act are: All deeds and conveyances whereby any hereditaments in the said county "may be any way affected in law or equity."

In *Malcolm* v. *Charlesworth* (1) a legacy charged by the will upon land in *Yorkshire* having been assigned, it was held that such assignment did not affect the land within the meaning of the *Yorkshire Registry Act*, but was an assignment of the money charged upon the land and of the money only.

It is said, however, in argument that this case is not law. It is cited by Lord *St. Leonards*, Vendors and Purchasers (2), without disapproval, and also in *Dart* (3).

I am not informed that it has ever been dissented from, and therefore I could not disregard it if I disagreed with the decision, which I do not.

But then it is said that the present case is distinguishable, because the gift is not of a legacy charged upon land, but of a share in the proceeds of the sale of such land. That is to say, that if the provision had been that the land should be sold, and out of the proceeds £1000 paid to *A.* and the rest to *B.*, an assignment by *A.* would not be within the *Registration Act*, but an assignment by *B.* would. That is a distinction which in my opinion cannot be maintained. There is no doubt that money to arise from the sale of real estate so far partakes of the nature of realty that it cannot be the subject of a bequest to a charity: *Attorney-General* v. *Lord Weymouth* (4). But the Registration Acts are intended to apply to dealings at law or in equity with the land itself, and I am of opinion that this case is not within them.

That conclusion is, I think, confirmed by the cases of *Foster* v. *Cockerell* (5) and *Lee* v. *Howlett* (6), where the incumbrancer of a precisely similar interest was, like the assign of a *chose in action*,

(1) 1 Keen, 63.
(2) 11th Ed. p. 973; 14th Ed. p. 727.
(3) 5th Ed. p. 681.
(4) Amb. 20.
(5) 3 Cl. & F. 456, 476.
(6) 2 K. & J. 531.

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held to rank in the order in which he gave notice of his incumbrance to the trustees, which as to equitable estates in land it is well settled is not the law: *Wilmot* v. *Pike* (1).

Accordingly an attempt has been made to shew in the second place that the applicants are entitled to priority on the ground of notice. The reason why incumbrances rank according to the dates on which they give notice is because such notice "completes" their title: *Foster* v. *Cockerell* (2). It is "tantamount to obtaining possession": *Dearle* v. *Hall* (3). It is "going as far towards equitable possession as it is possible to go": *Loveridge* v. *Cooper* (4). It is quite true that such notice does not give priority over an earlier incumbrance of which the trustee may have accidentally obtained knowledge: *Lloyd* v. *Banks* (5). But the converse proposition which it has been attempted in this case to maintain, that incumbrances are to rank, not in the order of notices given by the incumbrancers, but of accidental knowledge obtained by the trustees, is, so far as I am aware, entirely without authority and contrary to principle.

There is no pretence for saying that Messrs. *Pike & Howden* themselves gave notice of their incumbrance to the trustees of the will in any formal manner before the 21st of July, 1880. In an action for administration of the trusts of the will to which the trustees were Defendants, an inquiry had been directed as to the incumbrances on *Frederick Arden's* share and their priorities. And on the 21st of July, 1880, Messrs. *Pike & Howden* filed an affidavit in that action stating their incumbrance.

It is not disputed that the incumbrances Nos. 1, 2, and 5, in the schedule to the Chief Clerk's certificate have priority over the applicants'. As to Nos. 3 and 4, which are prior in date to the applicants' mortgage, in a list made by the solicitor of the trustees on the 22nd of July, 1879, these incumbrances are mentioned.

Of these, therefore, the trustees had knowledge at the time when *Pike & Howden's* affidavit was filed. And as to No. 6, which is later in date than the applicants' mortgage, on the 10th of

(1) 5 Hare, 14.
(2) 3 Cl. & F. 476.
(3) 3 Russ. 1, 23.
(4) Ibid. 30, 58.
(5) Law Rep. 3 Ch. 488.

July, 1879, express notice of this was given to the persons who were trustees of the will of *Joseph Arden*, describing the property comprised in this security, and therefore evidently intended to complete the mortgage upon that property, although this notice was addressed to them in their character of trustees of the will of *Temperance Arden*, the widow. As to No. 8, which is earlier in date than the applicants' mortgage, no notice was given except by an affidavit of the 16th of August, 1880, made in the administration suit after that of *Pike & Howden*.

In my opinion the attempt to prove any earlier notice on the part of the applicants than the 21st of July, 1880, which could give them priority, altogether fails. They rely upon a letter dated the 25th of July, 1879, not from them or their solicitors, but from the solicitors of the Plaintiff in the action to the solicitors of the trustees, in which Messrs. *Pike & Howden* are mentioned as incumbrancers, and also upon a correspondence in March, 1879, between their solicitors and Mr. *Johnson*, one of the trustees' solicitors, in which they mention that they are instructed for mortgagees of *Frederick Arden*, but do not say who those mortgagees are, nor give any further information. This correspondence in March evidently did not come to the knowledge of the trustees, nor produce much impression on their solicitor, for in the list made in July, 1879, no such incumbrance is mentioned. I do not think that Messrs. *Johnson*, although solicitors for the trustees, were their agents to receive notice of incumbrances, nor that either of these so-called notices was such as would give priority to the applicants or prevent a subsequent incumbrancer who gave direct notice from obtaining priority over them.

I therefore think that the only notice on which they can rely is that given by the affidavit of the 21st of July, 1880, and that the only person over whom they can obtain priority by virtue of that affidavit is the person entitled to incumbrance No. 8.

But as to No. 7, a different question arises. This is a judgment in respect of which, on the 8th of August, 1879, equitable execution was obtained by the appointment of a receiver subject to existing incumbrances. It has often been held that an execution creditor is not in the position of a purchaser, and this rule of

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obtaining priority by notice does not apply to him: *Scott* v. *Lord Hastings* (1). It is impossible that, by giving notice to the trustees, he should place himself in a better position than the judgment debtor. He takes subject to all prior equities, and accordingly No. 7 must, in my opinion, be postponed to the claim of the applicants. As against Nos. 7 and 8 the applicants may add the costs to their debt, but as against all the other incumbrancers whom they have attacked, the summons must be refused with costs, which the applicants must pay, and cannot add to their debt. The certificate will be varied in the manner and to the extent which I have indicated.

Solicitors: *Duffield & Bruty; J. & W. Maude; Capron, Daltons & Co.; Boltons, Robbins, Busk, & Co.; Abbott, Jenkins, & Abbott.*

(1) 4 K. & J. 633.

W. W. K.

In re BAKER.
CONNELL *v.* BAKER.

[1884. B. 3180.]

CHITTY, J.
1885
April 14.

Practice — Affidavit — Cross-Examination — Expenses of Deponent — Rules of Supreme Court, 1883, *Order* XXXVII., *rr.* 9, 13, 20, 21—*Order* XXXVIII., *r.* 28.

Plaintiff after judgment in an administration action having obtained an order for cross-examination of Defendant (the executor) upon his affidavit, in answer to inquiries directed by the judgment, denying possession of any part of the testator's estate, Defendant declined to attend before the Examiner until Plaintiff had paid his expenses. Plaintiff having subsequently served Defendant with a subpœna moved that he be ordered to attend at his own expense:—

Held, that it was open to the Plaintiff to combine the two methods of procedure, and that the Defendant was bound to produce himself at his own expense for cross-examination; and further, that regarding the Defendant as a deponent whose attendance was required for cross-examination, the penalty imposed by Order XXXVIII., rule 28, of having his affidavit rejected did not relieve him from the obligation to attend at his own expense.

THIS was a motion that the Defendant, *William Baker*, be ordered to attend at his own expense before one of the Examiners of the Court for cross-examination on his affidavit.

In June, 1884, the Plaintiff, who was one of the next of kin of the testator, *William Baker*, brought this action against the Defendant, the executor by whom the will was proved, claiming administration of the testator's estate, the appointment of a receiver, to have the particulars of the testator's estate in which she was interested ascertained, to have the next of kin ascertained, and a division amongst them of the estate to which they were entitled.

On the 8th of August, 1884, judgment was given in the action for the appointment of a receiver and directing accounts and inquiries.

A receiver was appointed, and Plaintiff had applied to Defendant on behalf of the receiver for delivery of so much of her share of the testator's estate as he was in possession of as executor.

On the 22nd of December, Defendant filed an affidavit denying that he had any part of the estate in his possession.

On the 12th of February, 1885, an order was obtained for the

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cross-examination of the Defendant on his affidavit, and on the 13th of March Plaintiff served Defendant with notice to produce himself before one of the Examiners on the 18th of March, and at the same time gave him notice that she did not (after the decision in *Backhouse* v. *Alcock* (1)) intend to pay his expenses.

The Defendant refused to attend before the Examiner until Plaintiff had paid his expenses, on which Plaintiff served him with a subpœna (*Stuart* v. *Balkis Company* (2)), and, as he still refused to attend, now moved that he be ordered to attend at his own expense, and be ordered to pay the costs occasioned by his non-attendance before the Examiner and of this application.

Renshaw, in support of the motion, contended that the Defendant was not entitled to demand his expenses in the first instance from the party requiring him to be produced for cross-examination on his affidavit, whether before or after judgment in the action: *Backhouse* v. *Alcock*; Rules of Supreme Court, 1883, Order XXXVII. rule 21; Order XXXVIII. rule 28. The Plaintiff in this case had complied with the requisites laid down in *Stuart* v. *Balkis Company*.

Bardswell, for the Defendant, *contrà* :—

Although after the decision in *Backhouse* v. *Alcock* the Defendant, in his position of a deponent, may not be able to insist that his expenses must be paid before he attends to be cross-examined, he ought not to be compelled by order of the Court to attend against his will. The penalty for non-attendance is provided by Order XXXVIII., rule 28, that "unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court or a Judge," and the Defendant is willing to submit to this penalty. *Backhouse* v. *Alcock* does not apply where the witness sought to be cross-examined is the Defendant himself. The proper course to be taken is for the Plaintiff to produce the Defendant as his own witness, in which case, by Order XXXVII., rule 9, the Defendant will be "entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in Court," while the Plaintiff may

(1) 28 Ch. D. 669. (2) 32 W. R. 676.

move to commit him if he refuses to attend, or he may ask the Court to reject entirely the Defendant's affidavit on which there has been no cross-examination. If the Plaintiff will first pay his expenses the Defendant is willing to attend for the purpose of being cross-examined.

Renshaw, in reply:—

It cannot be contended that the penalty mentioned in Order XXXVIII., rule 28, can apply to a refusal to attend upon a subpœna *ad testificandum*.

CHITTY, J.:—

An order is asked for in this action that the Defendant, *William Baker*, shall attend at his own expense before an Examiner of the Court to be cross-examined upon his affidavit filed the 22nd of December, 1884, after judgment in the action, and shall at the same time produce certain specified documents. An inquiry was directed by the judgment of the 8th of August, 1884, as to what property of the testator had passed through the hands of the Defendant as executor. As sole executor of the testator he is bound to answer that inquiry. He has made, however, a merely negative affidavit, in which he states that he has not in his possession any of the property in question, or any of the documents which he is required to produce, and the Plaintiff desires to cross-examine him, because he is a party to the action and an accounting party, and also because he is a deponent. The procedure adopted is that provided by Rules of Supreme Court, 1883, Order XXXVII., rule 21, and Order XXXVIII., rule 28. In *Backhouse* v. *Alcock* (1) I have already decided that Order XXXVIII., rule 28, which provides that the party producing a deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, when taken in conjunction with Order XXXVII., rule 21, applies to cases where evidence by affidavit upon which cross-examination is required is taken subsequently to the trial. Besides the notice in writing served under rule 28, the Plaintiff has also served the Defendant with a subpœna, but he has not attended

(1) 28 Ch. D. 669.

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under that, and his counsel now contends that the only penalty that he can incur in the event of his non-attendance is that provided by rule 28, that his affidavit shall not be used as evidence unless by the special leave of the Court or a Judge. By so holding I should be taking much too narrow a view of the rule. Every executor might decline to attend to be cross-examined, and thus avoid giving information as to the state of the assets. Moreover, by Order XXXVII., rules 13, 20, having been duly summoned by subpœna he is bound to attend for cross-examination, and I see no reason why, in a case of this kind, the Plaintiff cannot combine the two methods of procedure and compel the Defendant to attend both by subpœna and also under the orders referred to. An attempt was made to draw a distinction where the deponent was to be produced by one of the parties and where the party was called upon to produce himself, but I cannot admit that there is any distinction. The real question here between the parties is who shall bear the expense of producing the witness. The Defendant has, in fact, offered to produce himself if his expenses are first paid, but the practice now is that the deponent shall not be entitled to demand his expenses in the first instance from the party requiring his production. I hold therefore that the Defendant is bound to produce himself for cross-examination and at his own expense, and to pay the costs occasioned by his neglect to do so, and of this application.

Solicitors: *Shaw & Tremellen*, agents for *E. L. Phillips, Bacup; Sharpe, Parkers & Co.*, agents for *Peace & Ellis, Wigan.*

F. G. A. W.

WHEATLEY *v.* SILKSTONE AND HAIGH MOOR COAL COMPANY.

[1882. W. 4144.]

NORTH, J.
1885
April 18, 20.

Company—Debentures—Mortgage—Priority.

The directors of a company with power to borrow or create mortgages or issue debentures, issued debentures purporting to charge the undertaking and the hereditaments and effects of the company with the payment of the sums mentioned in the debentures respectively, to the intent that the debentures might rank equally as a first charge on the undertaking, hereditaments and effects of the company. They afterwards, in consideration of £4000 advanced and applied to the purposes of the company, deposited with the Plaintiff the title deeds of the colliery the property of the company, and by a written agreement charged the property comprised in the deeds with the payment to the Plaintiff of £4000 and interest:—

Held, that the mortgage to the Plaintiff had priority over the debentures.

THE *Silkstone and Haigh Moor Coal Company* was registered and incorporated in 1873. The objects of the company were the acquiring and working the *Allerton Bywater Collieries* in *Yorkshire*, and other collieries; and "the acquiring and using for any purposes of the company, and the selling, leasing, and disposing of collieries, lands, buildings, machinery, stock-in-trade, and other property, real and personal."

The 30th of the articles of association was: "The company by its directors may from time to time borrow and re-borrow for the purposes of the company any sum or sums of money on the security of the company or its property, on such terms, at such rate of interest, and in such manner as the directors may from time to time think proper, and for that purpose may create mortgages and securities, and issue bills, notes, bonds, debentures, and obligations at any time, and in any form or manner, and for any amount which the directors may from time to time decide upon."

The company had in 1878 borrowed £10,000, for which they gave debentures payable to bearer, and purporting to charge with the repayment the undertaking, lands, cottages, mines, works, plant, property, revenues, and effects, both present and future, of the company, to the intent that the debentures might rank equally

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as a first charge on the undertaking, lands, cottages, mines, works, plant, properties, and effects, both present and future, of the company. In 1879 they borrowed about £7200 on similar debentures. In 1881 the company borrowed from the Plaintiff, *J. H. Wheatley*, £4000, depositing with him the lease and muniments of title of the *Allerton Bywater Collieries*, and by an agreement in writing, dated the 4th of June, 1881, charging the hereditaments and property comprised in the deeds, evidences, and writings so deposited with the payment to the Plaintiff of £4000 and interest; and the company agreed at any time at the request of the Plaintiff to execute a legal mortgage of the property. By way of further security the company gave the Plaintiff a debenture for £4000 which was to rank *pari passu* with certain other debentures of the company, as a first charge upon the property; but that debenture and the other already existing debentures were thereby declared to be subject to the mortgage.

The £4000 advanced by the Plaintiff was applied by the directors in payment of rent and wages, and for the general purposes of the company.

The company in 1882 went into voluntary liquidation; and the Plaintiff brought this action against the company, the directors, and certain holders of the previous debentures, and the liquidator, claiming for the £4000 and interest a first charge upon the hereditaments and property comprised in the deeds.

The question was whether the Plaintiff's equitable mortgage for £4000 had or had not priority over the £17,200 debentures.

There was another question as to the priorities of the debenture holders, some of whom had been directors, but the Court was unable to decide that question in the absence of some necessary parties.

Barber, Q.C., and *Laing*, for the Plaintiff:—

The Plaintiff has an equitable mortgage which takes precedence over any debentures. Debentures have been decided to be merely a charge on the undertaking generally, leaving the directors at liberty to deal as they think fit with the specific articles of property. *In re Hamilton's Windsor Ironworks* (1) and

(1) 12 Ch. D. 707.

In re Florence Land and Public Works Company (1) are very similar. The words of the debenture shew that it was only meant to cover that which happened to be the property of the company at the time when the money became due. *In re Colonial Trusts Corporation* (2) was referred to.

W. W. Karslake, Q.C., and *F. B. Palmer*, for the company, took no part in the argument as to the priority of the mortgage.

Everitt, Q.C., and *Simmonds*, for some of the debenture-holders:—

The debentures are clearly stated to be a first charge on the property of the company, and nothing afterwards done can deprive the holders of their rights. If an individual had given such a charge no question could arise, and where is the difference between an individual and a company in such a case? The company, after giving the debentures, was merely an ordinary mortgagor in possession and could deal with the property in the ordinary way of carrying on their business but could not mortgage the *corpus*: *In re Panama, New Zealand, and Australian Royal Mail Company* (3). In *In re Florence Land and Public Works Company* the company had acquired the property. The exercise of the powers of the directors under art. 30 must be subject to what they have previously done. In all the cases cited the dealings have been in the ordinary course of business, and none goes so far as to say that after giving such debentures as these the company can mortgage the whole of its property to some one else.

Buckley, for a debenture-holder of the first issue:—

In the cases cited on the other side the words were not so general as they are here, nor were the debentures declared to be a first charge. Some meaning must be given to those words, and they must mean to give priority over any subsequent security given for borrowed money. Of course the directors might pay the trade creditors, and might perhaps sell any part of the

(1) 10 Ch. D. 530. (2) 15 Ch. D. 465.
(3) Law Rep. 5 Ch. 318.

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property, but, subject to that, the debenture-holders have a prior charge over all the property of the company for the time being and cannot be postponed by any charge or mortgage.

Stirling, *Latham*, *D. Gardiner*, and *Byrne*, for other Defendants.

NORTH, J., stated the facts of the case and referred to the clauses in the deed of settlement and to the terms of the agreement as to the £4000, and observed that it was not suggested that the £4000 had not been properly borrowed and applied, and that the deposit and agreement clearly gave the Plaintiff a valid security on the property subject only to the question whether the earlier debentures made him merely a second mortgagee or incumbrancer. His Lordship then read the terms of one of the debentures for the £10,000, and proceeded:—

If this is, as contended, a first charge upon everything mentioned in the debenture, it would cover everything that was then or might at any time become the property of the company. It would include every penny they had at the bank, every piece of property they had at the time, every sum they subsequently received in the course of carrying on the business of the company; and would give the debenture-holders the right to have all such moneys applied in satisfying them; and would prevent anybody who knew the circumstances from receiving any part of such money without being liable to repay it if called upon to do so. It seems to me impossible to say that such can be the meaning of the parties. In fact it has not been contended that the debenture is to receive this construction; but it seems to me that if the words "first charge" are to have the meaning put upon them by Mr. *Buckley*, it would necessarily go the length that I have indicated.

It is, in my opinion, clear that what was intended was that the parties holding the debentures should have the right of coming forward when the money was payable to them and saying that they had a first charge upon the property belonging to the company at that time, prior to any other charge to be set up in the same way against it; that is to say, if the money became payable, not only by the period of the loan elapsing, but—I merely take this as an instance—by winding-up, it was to be a first charge as

against the general creditors of the company. But I do not think the words "first charge" can mean a charge which shall prevent any person whatever under any circumstances from receiving any part of the assets of the company, even if his claim arose in the proper and *bonâ fide* exercise of the power of carrying on the undertaking. That construction is one which I am bound to put on the document, not only because it seems to me impossible to say that the undertaking was to be tied up and stopped at once, but also from the decisions which have been arrived at by the Courts with regard to similar instruments.

There are four cases to which I wish to refer as bearing upon the question. The earliest is *In re Panama, New Zealand, and Australian Royal Mail Company* (1). The case shortly was this. The company had power to issue mortgages and debentures, and it did issue mortgage debentures charging the undertaking and all sums of money arising therefrom; and the question was what was the effect of such a charge? It is true that it did not arise as between general claimants under that charge and persons claiming under a specific security, as is the case here, but arose only between persons claiming under the charge and the general creditors of the company. Lord Justice *Giffard* defined what his view was of the general effect of such a charge; and at page 322 he says: "I have no hesitation in saying that in this particular case, and having regard to the state of this particular company, the word 'undertaking' had reference to all the property of the company, not only which existed at the date of the debenture, but which might afterwards become the property of the company. And I take the object and meaning of the debenture to be this, that the word 'undertaking' necessarily infers that the company will go on, and that the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal, and that principal was unpaid. I think the meaning and object of the security was this, that the company might go on during that interval, and, furthermore, that during the interval the debenture holder would not be entitled to any account of mesne profits, or of any dealing with the property of the company in the ordinary course of carrying on their business. I do not refer to such things as sales

(1) Law Rep. 5 Ch. 318.

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or mortgages of property, but to the ordinary application of funds which came into the hands of the company in the usual course of business. I see no difficulty or inconvenience in giving that effect to this instrument." These words are relied upon, because *Giffard*, L.J., excepted from the effect of the deed, as construed by him, such things as sales or mortgages of property. What he was dealing with there was the property of a particular company. He was giving a general definition of what a debenture might be, and he was not saying that in every case it would preclude mortgages or sales. He was merely giving an illustration, and did not mean to deal with that point as it did not arise. That case therefore, does not seem in reality to help these parties, and it is clear that it does not apply to the present case, if Mr. *Buckley's* argument is right. He did not put it so high as to say that in the present case the company could not mortgage or sell its property. He admitted that they would have a clear power of sale, although he said that they could not mortgage except subject to prior charges.

The next case is *In re Florence Land and Public Works Company* (1). There the power was to borrow money on the security of all the estate, property, or effects, present or future. *James*, L.J., defined those words as being in his opinion equivalent to a charge upon the undertaking—the assets for the time being—and he said that in his view the effect of the security was this (2): "Then what is the meaning of binding the estate, property, and effects of such a company as this? In my opinion, the reasonable meaning, the only meaning which the persons who took it would have attached to it, was, that the words 'estate, property, and effects,' were in fact exactly equivalent to the word 'undertaking' which we find in the other cases, that is to say, it was to be, so far as the company could make it, a special charge upon the assets of the company, the assets which would be forthcoming at the time when the charge was to be made available; it was to be a special charge upon the assets in priority to the general creditors of the company. It appears to me there is nothing wrong in that; because the things are given for money lent, and therefore the company, and the creditors of the company, have had the benefit of the money. If the money has been laid out in buying or

(1) 10 Ch. D. 530. (2) 10 Ch. D. 546.

improving estates, why should not the persons who have given the money for the purpose of buying the land, or of erecting buildings upon the land, have a charge of this kind if the law allows it to be done? I am of opinion that the law does allow such a company as this to charge its undertaking, meaning by 'charging the undertaking,' charging the assets for the time being." Then, after expressing his opinion that this was the meaning in that case, he says, "I am of opinion that in this document these words were not surplusage, but were used *bonâ fide*, and were intended to have an effect which is capable of being given to them in the way suggested, namely, by creating a charge upon the assets for the time being. Of course that would leave them masters to deal with the property as long as the company remained a going concern, just as *Giffard*, L.J., said in the case before him, the company being a company capable of buying property, selling it, disposing of it, and making specific mortgages upon it, that they were to go on doing that according to the constitution of the company, all which the persons lending money must have known. Reading it, as I do, as a charge upon the assets for the time being of the company, that would not in the slightest degree interfere with the company carrying on the business for which it was incorporated." I have read those words of the Lord Justice *James*, because they define his view of the document itself. The Master of the Rolls and the Lord Justice *Thesiger* took precisely the same view, except that they arrived at the construction of the document by looking not only at the document, but at something else which was incorporated with it, namely, the articles of the company. There the views of all the learned Judges are identical as to what they conceived to be the meaning of that document, either standing alone or looked at in connection with those articles. That is very like the present case. It is clear that what was intended was that the company should go on as was intended here; and it was impossible that the company should go on unless the powers conferred on the persons managing the company could be exercised from time to time.

Another case referred to was *In re Hamilton's Windsor Ironworks* (1), which is also very like this case. There the company

(1) 12 Ch. D. 707.

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was carrying on a certain business. It had issued debentures, the effect of them being to charge all the undertaking, property, and effects of the company, both present and future. That is the view I take of the meaning of the words used in that case. Then, having done that, they wanted money to carry on their business. They required money, partly to buy materials and pay wages, which seems to me the purpose for which part of the money was actually wanted and applied in the present case. Now the contention there was, as it is here, that the prior charge was one which could not be displaced by what was done afterwards, and that turned upon, as the Vice-Chancellor pointed out, the question of what was included in the deed. Mr. *Buckley* relied very strongly on the words, that the debentures in the present case created a first charge; but the question is upon what? and that is the very question which was then considered by Vice-Chancellor *Malins*. He says (1): "The question therefore is, what was included in their deed? No doubt it was a security over all the property, but it was over the property of a company which was to go on with its business, and to do all acts necessary for the conduct of that business, and I am very clearly of opinion that one of the incidents of carrying on the business is obtaining money in times of emergency. In *Gibbs and West's Case* (2) I laid this down, and I do not see any reason for departing from what I then said. It has been very strongly urged in this case, that the company having no power to borrow, the borrowing was *ultrà vires* and improper, and that, therefore, no debt was created." In the present case there are in the articles some words authorizing the company to borrow. Then the Vice-Chancellor proceeds: "I should say, as indeed I have said on many occasions, that in the ordinary course of transactions of a mercantile concern, whether it be an insurance office or anything else, where the possession of money is essential for the purpose of carrying on the business, if the company finds itself in temporary difficulties for want of money, I cannot consider it beyond the powers of the directors to obtain money from bankers, or from others who will lend it to them for the purpose of preventing that which would be disastrous to all, namely, the stoppage of the company. I cannot consider it

(1) 12 Ch. D. 712. (2) Law Rep. 10 Eq. 312.

beyond the powers of the directors to prevent that disaster by means of loans to a moderate extent, such as would not be unreasonable, having regard to the nature and extent of the business in which the company is engaged. Mr. *Pearson* pressed upon me very much the question whether they could borrow £100,000 in derogation of the rights of the *Credit Company*. Most undoubtedly, in my opinion, they are not permitted to do any thing of the kind; but for the necessary purposes of paying the wages and buying materials to carry on their business, without which it could not be carried on, and to a moderate extent, with reference to the nature and extent of the business, I am very clearly of opinion that they were at liberty to borrow; and I am very clearly of opinion that it was the intention of all the parties to the deed of the 9th of March, 1877, that they should have liberty to do so." Then the Vice-Chancellor referred to the cases, and particularly to *In re Florence Land and Public Works Company* (1), and then he says he not only was bound by that case, but "I entirely concur in it, and I hold it to be the law that when a general mortgage of this kind is taken, whether it be by a form of debenture, or, as in the present case, by a general assignment of the property of a commercial company, that, in my opinion, necessarily leaves that commercial company in possession of their property for the purpose of carrying on their business in the usual way, and of doing all things necessary to enable them to carry on the business to advantage. Amongst those must necessarily be the power of borrowing for the purpose of paying wages and buying materials."

One other case has been referred to as bearing on this point, and that is *In re Colonial Trusts Corporation* (2). That was a case in which a company had been formed for the purchase of lands; there was power to borrow under particular circumstances, and there had been a borrowing upon debentures; and then the question arose as to what was the effect of the security created by those debentures. It was what the Master of the Rolls called "a floating security." He says (3), "What is the nature of the floating security? Now, as has been already pointed out both by the Lord Justice *James* and myself in the case of *In re Florence Land and Public Works Company*—it would be a monstrous thing to

(1) 10 Ch. D. 530. (2) 15 Ch. D. 465.
(3) 15 Ch. D. 472.

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hold that the floating security prevented the making of specific charges or specific alienations of property, because it would destroy the very object for which the money was borrowed, namely, the carrying on of the business of the company." He then referred to a certain clause in the articles, and then said: "The fact is, the only way of making the thing workable is to treat it (as I understand was decided in the case referred to) as what is sometimes called a floating mortgage or charge attaching on the property of the company in preference to its general liabilities, that is, its liabilities to creditors not secured by specific charge, at the moment the business is put an end to, either by the appointment of a receiver in an action instituted by the debenture-holders against the company, or at the commencement of the winding-up where the company is wound up."

Now, those authorities furnish a very clear and intelligible principle to be followed. In this case I find that the debenture is intended to be a general floating security over all the property of the company, as it exists at the time when it is to be put in force; but it is not intended to prevent and has not the effect of in any way preventing the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course; and, inasmuch as I find that in the ordinary course of business and for the purpose of the business this mortgage was made, it is a good mortgage upon and a good charge upon the property comprised in it, and is not subject to the claim created by the debentures. I find also that the first charge referred to in the debentures is fully satisfied by being the first charge against the general property of the company at the time when the claim under the debentures arises and can have effect given to it. There will be a declaration, therefore, that the charge of the Plaintiff is prior to the debentures.

Solicitor for Plaintiff: *F. Brooke*, for *Tennant & Co., Dewsbury.*

Solicitors for Defendants: *Badham & Williams*, for *Marsden & Co., Wakefield; Darley & Cumberland; S. B. Somerville*, for *Baxter & Co., Doncaster; J. W. Sykes*, for *Chatham & Son, Hull; Lambert, Petch, & Shakespear*, for *Snowdon & Meredith, Leeds; M. K. Braund*, for *Hutchinson & Co., Bradford.*

C. M.

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April 22, 23.

[1882 M. 4824.]

Legal Mortgage—Subsequent Deposit of Deeds—Priority—Negligence—Recovery of Deeds—Purchase for Value without Notice—Judicature Act, 1873, *s.* 25, *sub-s.* 11 [*Revised Ed. Statutes, vol. xvii., p.* 79].

A legal mortgagee had asked for the deeds which the mortgagor, who was his solicitor, made excuses for not giving to him. The mortgagor afterwards deposited the deeds with another mortgagee as security for money advanced without notice of the legal mortgage:—

Held, in an action by the legal mortgagee for foreclosure, that he had not been guilty of fraud or negligence amounting to fraud, and that he could not be postponed to the mortgagee by deposit by reason of any negligence short of that:

Held, that the legal mortgagee was entitled to recover the deeds from the mortgagee by deposit, notwithstanding he was a purchaser for value without notice; and that sect. 25, sub-sect. 11, of the *Judicature Act*, 1873, did not alter the rule of law on the subject.

In 1872 the Plaintiff, *W. W. Manners*, lent to his solicitor, *J. A. Mew*, £1000, the repayment of which was secured by a deed dated the 31st of May, 1872, whereby *Mew* conveyed to *Manners* certain hereditaments in the *Isle of Wight* subject to redemption on payment of £1000 and interest. *Manners* at the time asked *Mew* for the deeds, and was told by him that they were all right in *London*, and that *Manners* could have them whenever he liked. On several subsequent occasions *Manners* asked *Mew* for the deeds, and was told that they were in safe custody for him, but that the matter had escaped *Mew's* memory, and he would obtain them and send them to *Manners*. Some time afterwards, *Manners* spoke to the *London* agents of *Mew* about the deeds, and was told by them that they knew nothing about the deeds. In 1881 *Manners* changed his solicitors, and it was then found that the deeds were in the possession of *C. J. Mursell* and *C. E. Nobbs*, under these circumstances. In 1873 the deeds were deposited by *Mew* with the *National Provincial Banking Company*, as security for an advance. In August, 1873, *H. R. Hooper*, a solicitor in the *Isle of Wight*, advanced to *Mew* £1000, with which the bank was paid off, and

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the deeds were delivered to *Hooper* by way of equitable mortgage for securing the repayment of the £1000 and interest. In 1875 *Hooper* became a partner with *Mew*, and remained so until the year 1881. By an indenture of settlement made in 1878 on the marriage of *Hooper*, he assigned the £1000 to *Mursell* and *Nobbs* on the usual trusts, *Hooper* keeping the deeds for them. *Hooper*, *Mursell*, and *Nobbs*, denied that they had any notice of the mortgage to *Manners*.

In 1882 *Manners* brought this action against *Mew*, *Hooper*, *Mursell*, and *Nobbs*, claiming foreclosure and delivery of the deeds.

Barber, Q.C., and *Badcock*, for the Plaintiff, stated the case and examined the Plaintiff as a witness:—

The Plaintiff is prior in time and has the legal estate, and ought to have priority. No doubt he has not got the deeds, but that is not through any negligence of his. *Mew* was his solicitor, and was the proper person to keep the deeds: *Northern Counties of England Fire Insurance Company* v. *Whipp* (1). The Plaintiff has also a right to recover the deeds: *Cooper* v. *Vesey* (2).

Giffard, Q.C., and *C. Healey*, for the equitable mortgagees:—

A legal mortgagee who neglects to obtain the deeds, assists the mortgagor in committing fraud, and will not be allowed to avail himself of his legal estate against a purchaser for value without notice: *Briggs* v. *Jones* (3). *Heath* v. *Crealock* (4) is still law. *Clarke* v. *Palmer* (5), which is referred to in *Northern Counties of England Fire Insurance Company* v. *Whipp*, is an authority for the equitable mortgagees. As to the delivery of the deeds there is no case in which that has been ordered by a Court of Law after a Court of Equity has refused to interfere: *Head* v. *Egerton* (6). Even if the Plaintiff could have maintained an action of trover for the deeds, this Court is not bound by the strict rules of law. Where money has been advanced without notice, the person who has advanced it will not be deprived of what he has in his possession by a Court of Equity; and by sect. 25, sub-sect. 11, of the

(1) 26 Ch. D. 482.
(2) 20 Ch. D. 611.
(3) Law Rep. 10 Eq. 92.
(4) Law Rep. 10 Ch. 22.
(5) 21 Ch. D. 124.
(6) 3 P. Wms. 280.

Judicature Act, 1873, the rules of Equity are now to prevail and override the old rules of the Common Law.

Tanner, for the trustee in *Mew's* bankruptcy.

NORTH, J. (after stating the facts of the case, continued):—

The question is, whether the omission by the Plaintiff to obtain under those circumstances possession of the title deeds is to postpone his legal mortgage for the benefit of a person with whom about twelve months afterwards the deeds were deposited.

The rule as to what is necessary to postpone a legal mortgage, although it has been the subject of a difference of expression of opinion from time to time, seems to me now clearly settled and defined. The case of *Northern Counties of England Fire Insurance Company* v. *Whipp* (1) did not profess to, and of course could not, make the law, but it laid down what the law was in the clearest possible terms. That was a case in which there was a good legal mortgage, but the mortgagor was the manager of a bank, who were the mortgagees. The deeds were deposited in the safe of the bank, where they ought to have been, but the mortgagor, who had a key of the safe, took the deeds out and deposited them with a mortgagee from himself, concealing the fact that the bank had a mortgage; and it was said, under these circumstances, that what had been done amounted to a fraud, or such gross negligence on the part of the company as to postpone their security. The decision was, that what must be shewn in order to postpone a legal mortgage is fraud and nothing less. Gross negligence short of that will not do. The gross negligence may be such that, looking to the circumstances of the particular case, the Court will see that there was fraud; or it may be in itself, or coupled with other circumstances, sufficient to shew fraud; and if that is the result at which the Court arrives, the legal mortgagee is postponed; but unless that result is arrived at the legal mortgagee will not be postponed.

Now the judgment of the Court of Appeal was a considered judgment given by Lord Justice *Fry*, and the passages which I am going to read are, I think, very clear (2): "The question

(1) 26 Ch. D. 482.

(2) 26 Ch. D. 487.

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which has thus to be investigated is—What conduct in relation to the title deeds on the part of a mortgagee who has the legal estate, is sufficient to postpone such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage? The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate. It has been contended on the part of the plaintiffs that nothing short of fraud will justify the Court in postponing the legal estate. It has been contended by the defendant that gross negligence is enough." Therefore the issue is clear and defined. Then (1) the Lord Justice refers to *Evans* v. *Bicknell* (2), and the result is put in this way: "'There must be either direct fraud, or negligence amounting to evidence of fraud, to induce this Court to interfere for the purpose of postponing a party who insists on the legal benefit of his deed.'" Then a little further on he says: "That fraud and fraud alone was the ground for postponing the legal estate was, we think, the opinion of Lord *Hardwicke* in *Le Neve* v. *Le Neve* (3): 'Fraud or *mala fides*, therefore,' he said, 'is the true ground on which the Court is governed in the cases of notice.'" Then the learned Judge referred to *Barnett* v. *Weston* (4) and to *Ratcliffe* v. *Barnard* (5), and then he points out that from this *consensus* of expression as to the true rule there was no real departure in the language used by Lord *Cranworth* in the cases of *Colyer* v. *Finch* (6), and of *Roberts* v. *Croft* (7). Then he puts four heads under which he says the cases on the subject may be classed. The first is, "Where the legal mortgagee or purchaser has made no inquiry for the title deeds, and has been postponed, either to a prior equitable estate, as in *Worthington* v. *Morgan* (8), or to a subsequent equitable owner who used diligence in inquiring for the title deeds, as in *Clarke* v. *Palmer* (9). In these cases the Courts have considered the conduct of the mortgagee in making

(1) 26 Ch. D. 490, 491.
(2) 6 Ves. 174.
(3) Amb. 436, 447.
(4) 12 Ves. 130.
(5) Law Rep. 6 Ch. 652.
(6) 5 H. L. C. 905.
(7) 2 De G. & J. 1.
(8) 16 Sim. 547.
(9) 21 Ch. D. 124.

no inquiry to be evidence of the fraudulent intent to escape notice of a prior equity, and in the latter case that a subsequent mortgagee, who was, in fact, misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could as against him take advantage of the fraudulent intent." I pass from that head with this remark, that in this case there never was a prior equity, and it would require a strong case to come to the conclusion that the person who was a subsequent incumbrancer could get any relief under that head. Then the second head is this: "Where the legal mortgagee has made inquiry for the deeds, and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority, as in *Barnett* v. *Weston* (1), *Hewitt* v. *Loosemore* (2), and *Agra Bank* v. *Barry* (3)." Then two other heads are given, which I omit now, because they do not bear on the present case. Then there are two groups given in which the cases fall where the mortgagee who has received the deeds has afterwards parted with them. I do not dwell upon that in detail, because that is not this case. Then a little further on there are quoted some observations of Lord *Selborne* in the case of *Agra Bank* v. *Barry* in the House of Lords, to this effect (4): "It has been said in argument, that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case." Then a little further on the Lord Justice sums up the conclusions at which the Court arrived in this way: "The autho-

(1) 12 Ves. 130.
(2) 9 Hare, 449.
(3) Law Rep. 7 H. L. 135, 157.
(4) 26 Ch. D. 493.

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rities which we have reviewed appear to us to justify the following conclusions: (1.) That the Court will postpone the prior legal estate to a subsequent equitable estate: (*a.*) where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence where such conduct cannot otherwise be explained; (*b.*) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate. But (2.) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner." Mere carelessness there includes, in my opinion, gross carelessness, if there is any distinction; from the words which follow: "Now to apply the conclusions thus arrived at to the facts of the present case. That there was great carelessness in the manner in which the plaintiff company through its directors dealt with their securities seems to us to admit of no doubt. But is that carelessness evidence of any fraud? We think that it is not. Of what fraud is it evidence? The plaintiffs never combined with *Crabtree* to induce the defendant to lend her money. They never knew that she was lending it, and stood by. They can have had no motive to desire that their deeds should be abstracted and their own title clouded. Their carelessness may be called gross, but in our judgment it was carelessness likely to injure and not to benefit the plaintiff company, and accordingly has no tendency to convict them of fraud." Now reading those words again as applicable to the present case, I would ask of what fraud by the Plaintiff is there evidence? He never combined with *Mew* to induce *Hooper* to lend his money. He never knew that *Hooper* was lending it, or stood by. He could have had no motive to desire that his deeds should be abstracted and his title clouded. As the Lord Justice said: "Their carelessness may be called gross, but in our judgment it was carelessness likely to injure and not to benefit the plaintiff company, and accordingly

has no tendency to convict them of fraud." Those words seem to me to be precisely applicable to the present case; and the full consideration which the law received there makes it almost unnecessary for me to refer to any other case, but I wish to call attention to *Ratcliffe* v. *Barnard* (1), which is one of the decisions there followed. I do so because Lord Justice *James* puts the point very neatly and tersely: "This case is reasonably plain upon either of the two grounds. First, as to the alleged negligence, which is assumed by the plaintiff to be a ground for postponing *Barnard*, who has got in the legal estate as security for a debt antecedently due. The Lord Justice *Turner* has, in *Hunt* v. *Elmes* (2), expressed the only principle upon which in this Court a man will have his legal security taken away. He must have been guilty of fraud or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud. If a man abstains from inquiry under such circumstances that the Court will infer that he abstained in order to deprive himself of knowledge, then he will not be allowed to hold the property merely because he did not inquire. He has, in such a case, wilfully shut his eyes to the facts."

Then it is said that the acts of Colonel *Manners* shew that he was guilty of gross negligence, from which I ought to draw the inference that there was fraud. It seems to me that there was not gross negligence on his part, or any negligence at all.

[His Lordship then referred to the remarks of Lord Chancellor *Cairns* in *Agra Bank* v. *Barry* (3) and of Lord *Chelmsford* in *Espin* v. *Pemberton* (4) as shewing that facts very similar to those found in the present case were, in the opinion of those eminent Judges, not even evidence of negligence, much less evidence of such negligence as would prove fraud.]

Two cases were relied upon by the Defendants' counsel as assisting them in that part of the case; but they do not seem to me to have that effect. The first is *Briggs* v. *Jones* (5). All that was decided there was that a person who had a legal mortgage had lost priority by parting with the mortgage deed to a person

(1) Law Rep. 6 Ch. 652, 654.
(2) 2 D. F. & J. 578.
(3) Law Rep. 7 H. L. 135, 147.
(4) 3 De G. & J. 547, 556.
(5) Law Rep. 10 Eq. 92.

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who borrowed money upon it. That was under the second head referred to in the *Northern Counties of England Fire Insurance Company* v. *Whipp* (1), which is quite distinct from the present; in fact it was adopting the principle of the well-known case of *Perry-Herrick* v. *Attwood* (2). The other case is *Clarke* v. *Palmer* (3). The facts there were very complicated, but the certificate of the Chief Clerk shewed that the Rev. *J. Preston* was first mortgagee of lots 1 and 2; that Sir *J. R. Milbanke* was second mortgagee of lots 1 and 2, and first mortgagee of lot 3; that *E. P. Clarke* was third mortgagee of lots 1 and 2, and second mortgagee of lot 3. Now that certificate was not objected to so far as it found that *Preston* was first mortgagee of the first lot; but there was a motion to vary the certificate, as being wrong in making *Milbanke* the second mortgagee and *Clarke* the third. The whole question was not whether *Preston* was first and *Milbanke* second, or *vice versâ*, but whether *Milbanke* and *Clarke* ought to be second and third, or *Clarke* second and *Milbanke* third. If there was any resemblance between that case and the present, it would be as regards the question between *Preston* and *Milbanke*; but that was the point settled by the Chief Clerk's certificate, as to which there was no summons to vary: and it was not gone into. The case was like *Perry-Herrick* v. *Attwood*, and the only question the Court had to decide was whether the second mortgagee, who had done what he could to get the deeds, had got as great an advantage over the legal mortgagee as if he had actually got the deeds. That is a point with which I have nothing whatever to do here, and there was no observation made by the Vice-Chancellor there in any way bearing on the point I have to decide now. Those cases do not touch the present at all.

The second part of the case is this. It is said that the Defendant *Hooper* and the Defendants who claim under him had the deeds deposited with them *bonâ fide* and without notice, and that it is contrary to the course of this Court to allow the Plaintiff, the first legal mortgagee, to recover those deeds here. As regards his legal right to do so, that is quite free from doubt, and it is sufficient to refer to the case of *Newton* v. *Beck* (4) on the subject:—

(1) 26 Ch. D. 482.
(2) 2 De G. & J. 21.
(3) 21 Ch. D. 124.
(4) 3 H. & N. 220, 222.

[His Lordship then stated the facts of that case.] The judgment is, "The learned Judge was correct in his ruling. The operation of the mortgage was to give the plaintiff a property in all the deeds relating to the mortgaged land. Although he was in error in supposing that the real deed was delivered to him, that did not prevent it from being his property, and consequently he is entitled to maintain an action of detinue or trover in respect of it." Therefore the legal right of the Plaintiff is perfectly clear; but then it is said that if a person has, like the Defendant in the present case, *bonâ fide* got the deeds, it is not the course of a Court administering equity to direct him to hand them over. Upon that point the cases of *Head* v. *Egerton* (1), *Hunt* v. *Elmes* (2), and *Heath* v. *Crealock* (3) are three out of many, and it is quite clear that when a Court of Equity was giving equitable relief and nothing else, the defence that a man had got the deeds *bonâ fide* as a purchaser for value without notice, was considered a sufficient reason for the Court of Equity holding its hand and saying it would not take them away from him. It is said that that is the rule I ought to follow now, and that I ought to decline to order the deeds to be delivered up. It is said that whatever the legal right might be, if an action were brought at law, yet since the *Judicature Act* of 1873 the Court must only do what a Court of Equity would have done before the Act, upon the ground that the 25th section of the Act, sub-s. 11, provides: "That in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." But I do not see that there is any conflict or variance in such a case as this, because the general rule was that a legal Court was the proper Court to give a legal remedy, and must give it, while in an equitable Court equitable remedies only were given. And a Court giving equitable relief only, would not interfere to hand over a document which might be the subject of an action at law, but would leave the plaintiff to take proceedings at law. That, however, only applied to cases where the Court of Equity in giving equitable relief could not give legal relief, and did not apply to

(1) 3 P. Wms. 280. (2) 28 Beav. 631.
(3) Law Rep. 10 Ch. 22.

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any case in which the Court of Equity could give legal relief as well as equitable relief. There are one or two very good illustrations of that principle. *Williams* v. *Lambe* (1) was a case in which the plaintiff brought a suit to recover dower; that is to say the plaintiff came in equity to obtain legal relief in respect of a legal matter, with respect to which a Court of Equity had precisely the same jurisdiction as a Court of Law. It was one of the few cases in which a Court of Equity granted legal relief. The plea of purchase for value without notice was set up, and the Lord Chancellor said: "The only question was, whether a plea of purchase without notice, would lie against a bill to set out dower: that he thought where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable, not to a legal claim. He therefore overruled the plea." There are other similar decisions, but I do not refer to them more particularly because *Lord Westbury* referred to them in *Phillips* v. *Phillips* (2). The Lord Chancellor says: "There appear to be three cases in which the use of this defence is most familiar. First, where an application is made to an auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case in *Bassett* v. *Nosworthy* (3)), or by a tenant for life, for the delivery of title deeds (which was the case of *Wallwyn* v. *Lee* (4)), and the defendant pleads that he is a *bonâ fide* purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is, that as against a purchaser for valuable consideration without notice the Court gives no assistance—that is, no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of Law. Thus it was decided by *Lord Thurlow* in *Williams* v. *Lambe* (5) that the defence could not be pleaded to a bill for dower, and by Sir *John Leach* in *Collins* v. *Archer* (6) that it was no answer to a bill for fines. In those cases the Court of Equity was not asked to give the plaintiff any equitable as distinguished from legal relief." Therefore, if the effect of the *Judicature Act* had merely been to say that every Court must give relief in every

(1) 3 Bro. C. C. 264, 265.
(2) 4 D F. & J. 208, 216.
(3) Finch, 102.
(4) 9 Ves. 24.
(5) 3 Bro. C. C. 264.
(6) 1 Russ. & My. 284.

case brought before it, and that a Judge of the Chancery Division sitting as a Court of Equity must give legal relief—if that was the whole effect of the Act of Parliament, the result would be that, sitting here as a Court of Equity, I should have to administer legal relief also; and if the action had been brought at law that relief would have been given, as *Newton* v. *Beck* (1) clearly shews. Therefore, if recourse be had to the section of the *Judicature Act* which is relied upon, the course in equity and at law was the same before the Act passed in this respect as it has been since, and there is no variance or conflict. The practice I am asked to follow as being the course of the Court of Chancery is not the course which would have been followed by a Court of Equity where the subject was one in respect of which the Court of Equity had legal powers as well as equitable powers. But independently of that, the *Judicature Act* in my opinion has a much larger scope. It says that every Court is to administer everything—legal relief and equitable relief, and in the present case I am bound under the Act to administer legal relief and give the relief which the Plaintiff would have had at law. If authority were wanted, the case of *Cooper* v. *Vesey* (2) is a complete and binding authority. It is in fact undistinguishable from the present case, and I have gone fully into the law only because a point has been set up here which was not raised there.

It seems to me, therefore, that the Plaintiff is entitled to the relief which he asks on both heads, and there must be the ordinary decree for foreclosure with a declaration that the Plaintiff is the first mortgagee.

Solicitors for the Plaintiff: *Crowder, Anstie, & Vizard*, for *W. J. Beckingsale, Newport, Isle of Wight.*

Solicitors for the Defendants: *Sole, Turner, & Co.; Griffin & Quayle.*

(1) 3 H. & N. 220. (2) 20 Ch. D. 611.

C. M.

PEARSON, J.

1885

April 22.

In re HORNE AND HELLARD.

[1885 E. 50.]

Company—Debentures—Charge on all Property, present and future—Floating Security—Power of Company to deal with Property.

A company, which carried on the business of ironmasters and manufacturers, issued debentures for a total sum of £500,000, by which they charged their undertaking, works, stock-in-trade, plant, moneys, and other real and personal property, both present and future, with the payment of the sums secured by the debentures "to the intent that the same charge shall, until default in the payment of the principal or interest to accrue due or become payable in respect of the said sum of £500,000, or some part thereof, be a floating security upon the undertaking, works, and property of the company, not hindering sales or leases of, or other dealings with, any of the property or assets of the company in the course of its business as a going concern." The company afterwards contracted to sell some of their land:—

Held, that the purchaser was entitled to reasonable evidence that there had been no default in the payment of the principal or interest of the debentures.

In re Florence Land and Public Works Company (1) and *In re Colonial Trusts Corporation* (2) distinguished.

SUMMONS under the *Vendor and Purchaser Act*, 1874.

On the 2nd of September, 1884, an agreement was entered into between *A. V. Horne*, as agent for the trustees of the late Earl of *Egremont*, and *E. Hellard*, as agent for the *Ebbw Vale Steel, Iron, and Coal Company*, for the sale by the company to the trustees of a piece of land at *Watchet* for £300.

By the abstract of title subsequently furnished by the vendors to the purchasers it appeared that on the 28th of December, 1876, a deed was executed between the company of the one part, and *Edward Coward*, *Nathaniel Skelmerdine*, and *George Stewart* of the other part. This deed contained a recital of a mortgage dated the 15th of March, 1869, of certain property of the company to secure £150,000; a recital of a second mortgage dated the 1st of June, 1871, to secure £100,000; a recital of a resolution of the directors of the company, passed in the year 1874, to issue debentures of the company for a sum not exceeding £500,000, out of

(1) 10 Ch. D. 530. (2) 15 Ch. D. 465.

which the mortgage debts of £150,000 and £100,000 were to be discharged; that various debentures had been issued charged (*inter alia*) on the real and personal property, present and future, of the company as therein mentioned; a recital that there was then due on the first mortgage the full principal sum of £150,000, and on the second mortgage the principal sum of £54,000, and no more, and on the debentures of 1874 the principal sum of £268,000 and no more (making together the sum of £472,000); a recital that the company intended to issue the remainder of the debentures of 1874, and that they had resolved to secure further the debentures of 1874, and to borrow a further sum not exceeding £250,000, to rank in order of priority after the debentures of 1874, and that *Coward*, *Skelmerdine*, and *Stewart* had agreed to advance, out of moneys belonging to them on a joint account, £126,800 to the company, and might thereafter make further advances to the company not exceeding, with the £126,800, the full sum of £250,000, on having the same secured in manner hereinafter appearing. And the company thereby covenanted with *Coward*, *Skelmerdine*, and *Stewart*, for the repayment of the principal sum, with interest, in manner and at the times therein mentioned. And the company did thereby grant and demise to *Coward*, *Skelmerdine*, and *Stewart*, their heirs, executors, and administrators, all such and such parts as the company could grant or demise without occasioning a forfeiture, and did thereby charge all such part or parts as the company could not grant or demise but could charge without occasioning a forfeiture, of the land and other property therein described (including the piece of land at *Watchet*), To hold the same premises, subject as to such of them as were comprised in the said first and second mortgages respectively to the charges thereby created, and subject to the charges created by the said debentures of 1874, including any renewals or further issues of the said debentures within the limits of the resolution thereinbefore recited in priority to the other sums not exceeding £250,000 intended to be thereby secured, unto and to the use of *Coward*, *Skelmerdine*, and *Stewart*, their heirs, executors, administrators, and assigns respectively, according to the nature and quality of the estates, subject to a proviso for redemption on payment by the company of the debentures of 1874, and of

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£250,000, or so much thereof as should be advanced. There was an express declaration that nothing contained in the deed should affect the charge created by the debentures of 1874.

On the 29th of December, 1876, *Coward*, *Skelmerdine*, and *Stewart* executed a deed-poll by which they declared that they would hold the sum not exceeding £250,000 secured by the mortgage deed of the 28th of December, 1876, upon trust for the holders of the B debentures of the company *pari passu*, and that they would hold the mortgaged property, and all the powers given to them by the mortgage deed, upon trust as a further security for the payment in the first place of the 1874 debentures, not exceeding £500,000, and in the second place of the moneys secured by the B debentures *pari passu*. A schedule to this deed-poll contained a form of the debentures of 1874, as already issued.

The form there given was as follows:—

"The *Ebbw Vale Steel, Iron, and Coal Company, Limited*, hereinafter called the company, hereby acknowledge to owe to, and covenant with executors and administrators, to pay to the said executors, administrators, or assigns on the day of 18 the sum of £ and interest thereon in the meantime and until the same shall be paid at the rate of £5 per cent. per annum, by equal half-yearly payments, on the 1st day of and the 1st day of in each year, the first of such half-yearly payments to fall due and be made on the 1st day of 18 . And the company do hereby charge the undertaking, works, stock-in-trade, plant, moneys, and other real and personal property, both present and future, of the company with the said sum of £ and interest hereinbefore covenanted to be paid, And it is hereby declared that the sum of £ secured by this debenture is part of a sum not exceeding £500,000 authorized to be raised by a resolution of the board of directors of the company, bearing date the 1st of October, 1874, in exercise of the powers conferred upon them for that purpose by the articles of association, and to be charged on the property expressed to be hereby charged, of which sum of £500,000 the sum of £150,000 is to be applied in payment and satisfaction of the sum of £150,000 secured by way of first mortgage" of the 15th of March, 1869, of certain property of the company, "and a sum not

exceeding £100,000, further part of the said sum of £500,000, is to be applied in payment and satisfaction of the sum of £100,000, or such part thereof as may be now due, secured by indenture of second mortgage of the 2nd of June, 1871, to the intent that, when and so soon as the said existing mortgages or other securities for the said sums of £150,000 and £100,000 have been paid and satisfied, the said sum of £500,000, or so much thereof as shall from time to time be raised and due, shall constitute and be and continue to be the first charge upon the undertaking, works, and property of the company hereinbefore expressed to be hereby charged, and shall in the meantime rank in order of priority as a charge next after the said existing mortgages and securities, and the moneys remaining unpaid thereon, and so and to the intent that the same charge shall, until default in the payment of the principal or interest to accrue due and become payable in respect of the said sum of £500,000, or some part thereof, be a floating security upon the undertaking, works, and property of the company, not hindering sales or leases of, or other dealings with, any of the property or assets of the company in the course of its business as a going concern, and that the holder of this, and of the other debentures from time to time issued in the first instance or by way of renewal, in respect of the said sum of £500,000 shall be entitled to be paid the principal moneys and interest secured to them respectively *pari passu*, without any preference or priority between them." The B debentures were in a similar form.

The objects for which the company was established, as defined by the memorandum of association, included:—

"The carrying on the trades or businesses of miners, smelters, engineers, ironmasters, steel converters and manufacturers, iron-founders, and general contractors in all their branches, including the making and selling of bricks, and the making, purchasing, hiring and selling railway and other plant, fittings, machinery, and rolling stock."

"The selling and otherwise dealing with, and disposing of, all or any parts of the lands, hereditaments, and real and personal estates and properties and effects of the company, in such manner,

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and on such terms, and for such purposes as the company think proper."

The articles of association provided that "in their management of the business of the company the directors may . . . . do the following things in the name and on the behalf of the company (*inter alia*), they may borrow, in the name, or otherwise on behalf, of the company, such sums of money as they from time to time think expedient, either by way of mortgage of the whole, or any part of the property of the company, or by bonds or debentures, or in such other manner as they deem best; provided, nevertheless, that the aggregate of principal money to be borrowed shall not, at any one time, exceed one half of the paid-up capital of the company for the time being, unless the borrowing of a larger amount shall have been authorized by a general meeting, in which case the directors may borrow to such extent as is so authorized."

The purchasers required that the property should be released from the debentures, or that it should be shewn that they did not affect the power of the company, or of the trustees of the deed of the 28th of December, 1876, to sell and convey the property. The company insisted that, as the debentures were expressly made a floating security, the power of the company to deal with their property in the carrying on of their business was not affected.

The purchasers took out a summons under the *Vendor and Purchaser Act*, 1874, asking a declaration that the company and the trustees of the deed of the 28th of December, 1876, had no power to convey the property comprised in the contract for sale for an estate in fee simple free from the debentures issued by the company, and that a good title had not been shewn in accordance with the contract.

Cordery, for the purchasers:—

The vendors cannot make a good title without the concurrence of the 1874 or A debenture holders, unless they can shew that there has been no default in the payment of either principal or interest of those debentures. The moment there is default in payment of principal or interest, the security of the debentures ceases to be a floating security and becomes a fixed security.

The case is distinguishable from *In re Florence Land and Public Works Company* (1), the language of the instruments being different. In that case there was not, as there is here, an express definition of the time during which the debentures were to be a floating security. The trustees for the B debentures take subject to the charge created to secure the A. debentures. Moreover, the present company is not one whose main business is to sell land.

John Dixon, for the vendors:—

If the argument for the purchasers is well founded, the company could not deal with their property at all if there had been default in the payment of interest to the amount of 1*s.* for a single day. It will be practically impossible to prove that there has been no default. The right of the debenture holders could not be waived by the person whose interest was in default, because the charge enures for the benefit of all the debenture holders. Such a construction is a *reductio ad absurdum*. The clause is inserted for the benefit of the company, not for the benefit of the debenture holders. It is an imperfect attempt to express the effect of the decision in *In re Florence Land and Public Works Company*. That decision was followed in *In re Colonial Trusts Corporation* (2), which shews that the debentures do not become a fixed charge on the property until either a receiver is appointed at the instance of the debenture holders, or an order is made to wind up the company. It is essential to the carrying on of the company's business that they should be able to sell their land from time to time as the mines become exhausted and unworkable.

If the purchasers' construction of the debentures is right, they are *ultrà vires*, for the power given to the directors to issue them was only "in their management of the business of the company," and the result of the issue will be to stop the company's business.

At any rate the purchasers will get the legal estate in the property, and they have no notice of any default in the payment of the debentures; they will be perfectly safe.

[PEARSON, J.:—It may be that the principal of the debentures is not yet due, and there can be no difficulty in getting an affidavit

(1) 10 Ch. D. 530. (2) 15 Ch. D. 465.

PEARSON, J. from the company's secretary whether there has been any default in payment of the interest.]

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Cordery, in reply :—

The clause in the debentures only provides against sales of land by the company and other dealings *ejusdem generis*; it does not interfere with their business generally. If the debentures have become payable they can call them in and issue new ones.

PEARSON, J. :—

The question is whether, as matters now stand, the vendors have shewn a good title which the purchasers are bound to accept. The objection is that the company have not shewn that they have power to sell as against the holders of the first series of debentures. [His Lordship referred to the form of the 1874 or A debentures, and to the above stated clause in the articles of association, and continued :—]. It is plain, therefore, that it is not *ultrà vires* for the directors to borrow money upon a mortgage of the whole of the property of the company. It is said that this power is governed by the introductory words "in their management of the business of the company," and that they can borrow money in such a way only as is conducive to the carrying on of the business of the company, and that a mortgage of the whole of the property of the company would prevent it from carrying on its business. I cannot quite follow this argument, though, no doubt, there is strong ground for it in the decisions which have been referred to. But, when I find that express power is given by the articles to borrow money on mortgage of the whole of the property of the company, I cannot conclude that a mortgage of the whole of the property will be injurious to the management of the business of the company. The two cases which have been cited seem to me to go as far as possible in holding that a company, when it has mortgaged its real estate, is still at liberty to deal with that estate as if it was not mortgaged. In *In re Colonial Trusts Corporation* (1), *Jessel*, M.R., said (2), "The form of the debenture is this: it first binds the company with the penal sum mentioned in the bond, and then it binds the company and their successors

(1) 15 Ch. D. 465. (2) 15 Ch. D. 468.

and their real and personal estate," and further on he adds that it was decided in *In re Florence Land and Public Works Company* (1), "that it is what is called a 'floating security.' To adopt the expression of *James*, L.J., it is 'a charge upon the assets for the time being,' leaving the company to deal with them as they think fit till they are stopped either by a receiver or a winding-up." And again (2) he said, "the only way of making the thing workable is to treat it (as I understand was decided in the case referred to) as what is sometimes called a floating mortgage or charge attaching on the property of the company in preference to its general liabilities, that is, its liabilities to creditors not secured by specific charge, at the moment the business is put an end to, either by the appointment of a receiver in an action instituted by the debenture holders against the company, or at the commencement of the winding-up where the company is wound up, either by voluntary winding up or under the compulsory power of winding up by the Court." I will assume in favour of the vendors that, if the debentures in the present case had stopped at the words "the company do hereby charge the undertaking, &c., and other real and personal property, both present and future, of the company with the said sum of £ and interest hereinbefore covenanted to be paid," I should be bound by the decisions which have been cited to hold that these debentures create a charge on the property of the company existing at the time when their dealing with their property is stopped by the appointment of a receiver at the instance of the debenture holders, or by the winding-up of the company. But the debenture does not stop there. It goes on "so and to the intent that the same charge shall, until default in the payment of the principal or interest to accrue due or become payable in respect of the said sum of £500,000, or some part thereof, be a floating security upon the undertaking, works, and property of the company, not hindering sales or leases of, or other dealings with, any of the property or assets of the company in the course of its business as a going concern." If I am to adopt the decisions in the two cases cited, I must strike out a great part of this clause, and insert instead the words "until a receiver of the property of the

(1) 10 Ch. D. 530, 547. (2) 15 Ch. D. 472.

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company shall be appointed, or until there shall be a winding-up of the company." I know of no authority for making that alteration, and I cannot see why, if the directors have power to create a charge on the whole property of the company, and they do create a charge on the whole property which is to be a floating security only until default is made in payment of the principal or interest of the debentures, I should say it is a floating security until a receiver is appointed of the company's property or there is a winding-up. In my opinion these debentures are made a charge on all the property of the company, but with this restriction, that it is to be a floating security until default is made in payment of the principal or interest of the £500,000 or some part of it. I think, therefore, that the purchasers are entitled to some reasonable evidence that there has been no default in payment of the principal or interest of the first series of debentures. I cannot see that there will be any difficulty in one of the company's officers stating that no part of the principal has yet become due, and that the interest has been paid regularly. I must declare that the requisition has not been satisfactorily answered.

Solicitors for Purchasers: *Walker, Martineau, & Co.*

Solicitors for Vendors: *Gregory, Rowcliffes, & Co.*, agents for *Hellard, Stogumber.*

W. L. C.

PEARSON, J.

1885

April 23.

In re MEREDITH. MEREDITH *v.* FACEY.

[1883 M. 3956.]

Creditors' Deed—Time for executing.

Incumbrancers who had claimed priority over a creditors' deed and failed in their contention were not allowed afterwards to execute and take the benefit of the deed.

UNDER the will of *Joseph Meredith*, late of *Abergavenny*, proved in January, 1873, his daughter, *Eliza Haigh*, the wife of *Francis Haigh*, was entitled to one-fourth of the testator's residuary personal estate, and of the moneys arising out of the sale of his real estate, in remainder expectant on the death of her mother *Sarah Meredith*.

On the death of her brother, the Rev. *Joseph Meredith*, in November, 1878, intestate, Mrs. *Haigh* became entitled to a further reversionary share of the testator's residuary estate, and under the will of her mother, who died in 1883, she became entitled to a further interest in the testator's residuary estate. Mr. and Mrs. *Haigh* had executed a number of deeds of charges on Mrs. *Haigh's* reversionary interest in her father's estate. *Henry Meredith* was the surviving executor and trustee of the will of estate of *Joseph Meredith*, the testator, the sole administrator of the the Rev. *Joseph Meredith*, and the sole executor of *Sarah Meredith*. He took out an originating summons to have the rights and priorities of the several persons who claimed to be incumbrancers on and interested in the share of *Eliza Haigh*, both original and derivative, determined.

One of the incumbrances in question was a creditors' deed dated April 1, 1880, expressed to be made between *Francis Haigh* and *Eliza Haigh* his wife of the first part *S. H. Facey* and *B. E. Hodgens* of the second part, and the several creditors of the said *Francis Haigh* of the third part. The deed after reciting two prior incumbrances, namely a mortgage in favour of Messrs. *Gabb & Walford*, defendants to the summons, dated October, 1879, and a mortgage to *James Sayce*, dated March, 1880, contained this recital: "And whereas the several persons whose names

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and seals are hereto subscribed and affixed, being respectively creditors of the said *Francis Haigh* in the sums set opposite to their respective names in the schedule hereunder written, have on behalf of themselves respectively agreed to the said proposal." *Francis Haigh* and *Eliza Haigh* assigned the interest of the latter, both under the will of her father and under the intestacy of the Rev. *Joseph Meredith*, to *Facey* and *Hodgens*, upon trust on the death of *Sarah Meredith*, after payment of the expenses relating to the trust of the deed, in the next place to pay "to the several creditors whose names and seals are hereunto subscribed and affixed the debt or sum set opposite to their respective names in the schedule hereunder written, without interest," and to pay the surplus, if any, to *Francis Haigh*, his executors and assigns.

There was a further witnessing clause by which "the creditors of the said *Francis Haigh* and every of them" released him from all debts. And lastly, the deed provided that nothing therein contained should prejudice or affect any security held by any creditor of the said *Francis Haigh*, or any rights or remedies which any creditor might have against any person or persons other than the said *Francis Haigh*, for or in respect of his debt or any part thereof, but so nevertheless that any creditor having a security upon any property of the said *Francis Haigh* for the whole or any part of his debt should not be entitled to payment under the trusts thereinbefore declared without allowing for and deducting from his debt the value of such security."

In pursuance of an order made on the summons the Chief Clerk certified that the incumbrances on the shares of Mrs. *Haigh* in the estate of *Joseph Meredith* ranked as follows: first, the mortgage to Messrs. *Gabb & Walford*; secondly, the mortgage in favour of *James Sayce*; thirdly, the creditors' deed, dated the 1st of April, 1880; fourthly, a mortgage in favour of *Catharine M. N. Webb*, dated the 20th of January, 1877; and, lastly, four incumbrances of equal priority *inter se*, namely, a memorandum in favour of *David Meredith*, deceased, dated the 15th of February, 1879, to secure £160 11*s.* 4*d.* and interest; a memorandum of the same date in favour of *William Goslett*, to secure £10 and interest, a memorandum of the same date in favour of the Plaintiff, *Henry Meredith*, to secure £35 and interest; and a memorandum of the

same date in favour of *David Meredith* (deceased) and the Plaintiff *Henry Meredith* as trustees to secure £100 and interest.

None of the parties in whose favour the several memoranda of the 15th of February, 1879, were given executed the creditors' deed of the 1st of April, 1880. The schedule of debts to that deed comprised the debt of £100 to *David* and *Henry Meredith*, and a sum of £21 9*s.* 2*d.* as due to *David Meredith*. The debts to *William Goslett* and *Henry Meredith* were not scheduled.

The several persons in whom the benefit of the four memoranda of charge of the 15th of February, 1879, were now vested claimed priority before the Chief Clerk over the other incumbrancers; he decided against them on that point, and submitted to the Court the question whether they were now entitled to execute the creditors' deed of the 1st of May, 1880. The summons was adjourned into Court, and now heard upon that question.

A. B. Walford, for the holders of the memorandum of the 15th of February, 1879:—

The deed was for the benefit of all creditors who should come in and execute it. There was no time limited. The creditors can therefore come in to get the benefit of the deed at any time before the fund is distributed, that is to say, it is not too late now: *Broadbent* v. *Thornton* (1). They have not acted inconsistently with the deed, and are not precluded on that account: *Field* v. *Lord Donoughmore* (2). Even where a limit of time has been fixed within which to accede to composition deeds creditors standing by have been allowed to come in: *Whitmore* v. *Turquand* (3).

Cavanagh, for the trustees of the creditors deed, and *Creed*, for Miss *Webb*:—

As to the non-scheduled creditors they are not within the terms of the deed. All four sets of creditors have lost their right by standing by or refusing to execute the deed for a number of years and by setting up an adverse claim till the end: *Garrard* v. *Lord Lauderdale* (4); *Brandling* v. *Plummer* (5); *Field* v. *Lord*

(1) 4 De G. & Sm. 65.
(2) 1 D. & War. 227.
(3) 1 J. & H. 444.
(4) 2 Russ. & My. 451.
(5) 27 L. J. (N.S.) 188.

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Donoughmore (1); *Watson* v. *Knight* (2); *Johnson* v. *Kershaw* (3); *Forbes* v. *Limond* (4); *Lane* v. *Husband* (5); *Acton* v. *Woodgate* (6); *Gould* v. *Robertson* (7). The security of Miss *Webb* cannot be postponed by any act of theirs subsequent to her security being made absolute by notice to the trustees.

A. B. Walford, in reply:—

This case differs from cases like *Watson* v. *Knight*, where an indulgence is sought in extending the limit of time fixed within which to execute, for here no time has been fixed. The non-executing creditors have not sought to impeach the creditors' deed; they thought they had priority and asserted their supposed right, a right which, if they had it, was acknowledged and preserved by the creditors' deed, a deed expressed to be without prejudice to any security held by creditors.

PEARSON, J. (after deciding that the creditors entitled to execute the deed were not confined to scheduled creditors, continued):—

The persons who now seek to get the benefit of the deed never executed it. Two are in fact named in the schedule, the others are not named. Nevertheless they say they are entitled to come in and share in the benefit of the deed because no time was limited in the deed and no distribution has yet been made under the deed. The fact is, that the interest has only lately fallen into possession, and it has only now become possible to distribute; and if the case rested simply on their not having come in during five years, and if I were satisfied that they had not intended either to dispute or dissent from the deed, I do not know that I should have rejected their claim to come in at this time. But the fact is, the property the subject of the deed is part of the estate of *Joseph Meredith*, which is being administered, and these parties have come in wishing to assert that they have a prior right under prior charges which would to a great extent defeat the purposes of the deed, and having endeavoured to assert a claim antagonistic to

(1) 1 D. & War. 227.
(2) 19 Beav. 369.
(3) 1 De G. & Sm. 260.
(4) 4 D. M. & G. 298.
(5) 14 Sim. 656.
(6) 2 My. & K. 492.
(7) 4 De G. & Sm. 509.

the deed now wish to come in under it. It seems to me the case is on all fours with *Watson* v. *Knight* (1). In that case a creditor named in the deed did not come in within the time limited by the deed; but at the sale of the property included in the deed, gave notice that she had a prior judgment on it. Lord *Romilly* says this: "I am of opinion that she would not have been bound by the non-execution before the 2nd of June if it had occurred by accident, and she had come the next day and offered to execute it; but having allowed more than four months to elapse, and having set up a claim to the property adverse to the deed, I think she is precluded. If she had intended to come in under the deed, she must have released her claim under the judgment, and it was her duty to inform the trustees without delay that she intended to claim under the deed, and to release her judgment." Now I cannot help seeing that, considering the proceedings these parties have taken at Chambers, it never was their intention to come in till the point of priority was decided against them, it was only when that was disposed of adversely that they seek to come in.

Solicitors: *J. T. & G. F. Marshall*, agents for *Gabb & Walford, Abergavenny; E. D. T. Matthews*, agent for *B. E. Hodgens, Abergavenny; Fallows & Rider.*

(1) 19 Beav. 369, 372.

D. P.

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May 8, 9, 11.

AUSTERBERRY *v.* CORPORATION OF OLDHAM.

[1884 A. 4096.]

Turnpike Road—Private Owners—Tolls—Dedication to Public—"Street"—"Highway repairable by inhabitants at large"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150 [*Revised Ed. Statutes, vol. xvii., pp.* 528, 567]—*Covenant to repair—Assigns—Covenant running with the Land—Personal Covenant—Notice, Equitable Doctrine of.*

The doctrine in *Tulk* v. *Moxhay* (1) is limited to restrictive stipulations, and will not be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs or otherwise which does not run with the land at law.

Semble, that the burden of a covenant (not involving a grant) never runs with the land at law, except as between landlord and tenant.

Cooke v. *Chilcott* (2) overruled on this point.

Morland v. *Cook* (3) explained.

Holmes v. *Buckley* (4) discussed.

Consideration of the circumstances under which a covenant will be held to touch or concern the land of the covenantee so that the benefit may run with the land.

A., by deed, conveyed for value to trustees in fee a piece of land as part of the site of a road intended to be made and maintained by the trustees under the provisions of a contemporaneous trust deed (being a deed of settlement for the benefit of a joint stock company established to raise the necessary capital for making the road); and in the conveyance the trustees covenanted with *A.*, his heirs and assigns, that they, the trustees, their heirs and assigns, would make the road and at all times keep it in repair, and allow the use of it by the public subject to tolls. The piece of land so conveyed was bounded on both sides by other lands belonging to *A.* The trustees duly made the road, which afforded the necessary access to *A.'s* adjoining lands. *A.* afterwards sold his adjoining lands to the Plaintiff, and the trustees sold the road to the Defendants, both parties taking with notice of the covenant to repair :—

Held (affirming the decision of the Vice-Chancellor of the Duchy of *Lancaster*), that the Plaintiff could not enforce the covenant against the Defendants.

The promoters of an intended road by deed declared that the road should not only be enjoyed by them for their individual purposes, but "should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road," but subject to the payment of tolls by the persons using it :—

Held, that this was not a dedication of the road to the public, and that

(1) 2 Ph. 774.
(2) 3 Ch. D. 694.
(3) Law Rep. 6 Eq. 252.
(4) 1 Eq. C. Ab. 27.

the road was not a highway repairable by the inhabitants at large under sect. 150 of the *Public Health Act*, 1875.

Semble, an individual cannot, without legislative authority, dedicate a road to the public if he reserves the right to charge tolls for the user; and the mere fact that a number of persons form themselves into a company for making and maintaining a road, and erect gates and bars and charge tolls, does not make the road a "turnpike road" in the sense of a turnpike road made such by Act of Parliament, and so dedicated to the public.

IN the year 1837, the owners of property adjacent to an old circuitous highway leading from *Higginshaw* to *Lower Moor*, in the borough of *Oldham*, being desirous of constructing a shorter and more direct road between those places, it was proposed that the owners of the lands through which the new road was to pass should sell the necessary slips of land for agreed sums of money amounting in the aggregate to £173 19*s.* 10*d.*, the sum agreed to be paid to one of these landowners, *John Elliott*, through whom the Plaintiff in this action claimed, being £14 11*s.* 8*d.* It was also proposed that the construction and maintenance of the road should be undertaken by an association or company of proprietors who were to be represented by trustees.

To carry out this arrangement a deed of settlement was executed on the 3rd of March, 1837. The parties to this deed were *Joshua Milne*, *John Milne*, and *Samuel Lees*, of the first part, *James Milne* and *John Travis* of the second part, the said *James Milne* and various other persons whose names and seals were comprised in the 2nd schedule thereto and the several other persons who should from time to time execute the deed and whose names and seals should be comprised in the 3rd schedule thereto, of the third part. The deed then recited as follows: That the making of the proposed new road would be of great public advantage; that the several parties thereto, being willing at their own expense to carry out the undertaking, had agreed to form amongst themselves a joint stock company, under the style of the *Higginshaw and Lower Moor Road Company*, and to raise capital for the purchase of land for the formation of the road and making and maintaining the same: that it had been agreed that the said *Joshua Milne*, *John Milne*, and *Samuel Lees* should be the trustees in whose names the land necessary for the road should be purchased,

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and that the road when completed should not only be appropriated, used and enjoyed by the parties thereto "for their individual purposes, but (subject as thereafter mentioned) should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road:" that contracts had been entered into by or on behalf of the said company for the purchase of the necessary lands for a total sum of £173 19*s.* 10*d.*, and proper conveyances had been prepared and were awaiting execution for vesting such lands in the said *Joshua Milne*, *John Milne*, and *Samuel Lees*, who were to stand possessed thereof upon the trusts thereinafter declared: and that the business of the said company should be carried on subject to the provisions thereinafter contained, it was then witnessed and agreed that the said *Joshua Milne*, *John Milne*, and *Samuel Lees* and the survivors and survivor of them, and the heirs of such survivor, should for ever thereafter stand possessed of the lands intended to be granted to them, upon the trusts thereinafter declared: And it was further witnessed and agreed that the said parties thereto, and all other persons who should thereafter become proprietors as thereinafter mentioned, should, whilst holding shares in the capital of the said company, be and they were thereby united into a company for making and maintaining the said road, and should be and continue the proprietors thereof under the name of "*The Higginshaw and Lower Moor Road Company*;" that for the purpose of making and maintaining the road and other general purposes attending the same a capital of £1600 should be raised in thirty-two shares of £50 each; that the number of shares held by each person should be written opposite his or her names at the time of his or her executing the deed; that the said £173 19*s.* 10*d.* should be paid out of the capital of the company for the purchase of the land necessary for the road as aforesaid, and that the remainder of the money to be received by the said company, whether by way of capital or profits, or otherwise, should be applied by the trustees in paying the costs of the present deed, of the conveyances, and of the establishment of the said company, and that the remainder of the capital should be applied in making and afterwards maintaining in repair the said road pursuant to the specification, ground plan, and cross section contained in a schedule of even date, and in

setting up necessary toll-gates. Then followed provisions describing the line of road; for the erection of tables of tolls to be fixed from time to time by a majority in value of the company at a meeting for the purpose: "that no person or persons (except such persons and for the purposes only as are mentioned in the said several conveyances of the said land so purchased by the company as aforesaid) shall be allowed to travel upon, use, or enjoy any part of the said road, or pass through any such toll-gate, side-bar, or chain, to be erected or set up as aforesaid, without having previously paid such toll as may from time to time be demanded of him, her, or them, pursuant to the table of tolls for the time being authorised by the said company to be demanded and taken as aforesaid:" for payment of tolls by the parties to the present deed: that the trustees should apply the tolls in payment of the current expenses of the company, "and in repairing and keeping in repair the said road," and in discharge of the principal and interest of any moneys borrowed on the security of the tolls, and then in payment of the dividends declared to the proprietors of the company. Then followed various provisions as to meetings, rights of voting, keeping of the company's books, calls on and forfeiture of shares, declaration of dividends, appointment of new trustees by the shareholders, variation or modification of any clauses in the present deed, and enrolment of the present or any future deed of settlement by the trustees if deemed expedient.

The schedule of even date referred to in this deed was signed by the parties to the deed, and the owners of the slips of land which were to be conveyed as the site of the road, and contained a specification describing the construction of the road with a plan attached shewing its course, and the lands, with the owners' names, through which it was to run. Amongst the owners' names appearing on the plan was that of *John Elliott*, the Plaintiff's predecessor in title, who owned the land on each side of the slip agreed to be conveyed by him.

John Elliott conveyed his slip of land to the trustees by an indenture dated the 8th of April, 1837, being one of the intended conveyances referred to in the deed of settlement. This deed was made between the said *John Elliott* of the one part, and the

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said *Joshua Milne, John Milne* and *Samuel Lees* of the other part; and thereby the said *John Elliott* in consideration of the sum of £14 11*s.* 8*d.* paid to him by the said *Joshua Milne, John Milne* and *Samuel Lees,* granted and released unto the said *Joshua Milne, John Milne* and *Samuel Lees,* their heirs and assigns, the plot of land therein described—being part of certain lands belonging to him, *Elliott,* called *Higher Moor Fold,* and which said plot of land was therein expressed to be intended to form part of the said intended line of road from *Higginshaw* to *Lower Moor*—together with liberty to enter upon the adjoining lands of the said *John Elliott* for making and completing the said road, and to erect on the said plot of land toll-gates with toll-houses, and to demand and take the tolls mentioned in any table of tolls put up at any such toll-gate before any horse, beast, cattle, cart, waggon or carriage (except as thereinafter mentioned) should be permitted to pass through such toll-gate, except mines and minerals, "and also except such rights and privileges of passing toll free over the said line of road for certain purposes as hereinafter is mentioned and expressed:" To hold the said plot of land, liberties, powers, and privileges, unto and to the use of the said *Joshua Milne, John Milne* and *Samuel Lees,* their heirs and assigns for ever, for the ends, intents and purposes therein in that behalf expressed and declared of and concerning the same (that was to say): "Provided always, and it is hereby agreed and declared by the said parties to these presents, and each of them the said *Joshua Milne, John Milne* and *Samuel Lees,* for himself severally and respectively, and to and for his several and respective heirs and assigns, doth covenant and agree with the said *John Elliott,* his heirs and assigns, by these presents in manner following (that is to say), that they the said *Joshua Milne, John Milne* and *Samuel Lees,* their heirs or assigns, or some or one of them, shall, and will within the space of three years now next ensuing, at their or his own costs and charges, convert, make, and form, and fence off, in a good, workmanlike, and proper manner, the whole of the said plot of land, hereditaments and premises hereby granted and released, into a road or way to form part of the said line of road from *Higginshaw* to *Lower Moor* aforesaid, and in like manner make and form the remainder of the said line of

road, which when so finished shall be of the length, width, dimensions and construction, and made of such stone and other materials and in such manner as is set forth and expressed and as drawn and laid down or delineated in the specification, ground plan and cross section contained in a certain schedule or writing bearing date the 3rd day of March last past and since the date and execution hereof signed by the said several persons parties to these presents and by several other persons owners of other lands over which the said intended line extends; and also that the said line shall from and immediately after the expiration of the said term of three years (subject nevertheless to such tolls for horses, cattle, beasts, carts and carriages passing thereon as may by the said *Joshua Milne*, *John Milne* and *Samuel Lees*, their heirs and assigns, from time to time be fixed and determined upon) be used by the public; and shall and will for ever hereafter be kept open and used as and for a road for the use of the public (subject as aforesaid); And also that they the said *Joshua Milne*, *John Milne* and *Samuel Lees*, their heirs and assigns, shall and will from time to time and at all times hereafter keep and maintain the said road and every part thereof in good repair, order and condition, except such part thereof as hereinafter is mentioned." Then followed a proviso that no toll should be taken or demanded from *Elliott*, his heirs or assigns, lessees, tenants or occupiers, for any horse, cattle, beast, or carriage laden with materials for repairing the fences or drains thereinafter covenanted to be kept in repair and maintained by *Elliott*, his heirs or assigns, or his or their tenants, &c., of the lands adjoining the said plot of land thereby granted, nor for any horses, &c., or carriages passing over the said line of road for any purpose connected with the occupation of the said lands called *Higher Moor Fold* for farming or agricultural purposes only or relating to the cultivation thereof. And *Elliott* covenanted that he, his heirs or assigns, or the tenants, &c., of the lands adjoining the said plot of land thereby granted, would at all times keep in repair and maintain the fences and ditches on each side of so much of the said road as passed over the lands of him, *Elliott*, and also keep the drains thereof in repair.

Elliott, though a vendor, was not a member of the company of

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proprietors of the new road, and he never executed the trust deed. In or about the month of May, 1837, four conveyances in similar terms of sites for the new road were executed to the trustees by other landowners. At the time the trust deed and conveyances were executed the lands through which the new road was to pass were and had been used for agricultural purposes.

The trustees having taken possession under their several conveyances, the new road, afterwards called *Shaw Road*, was duly made and, until the purchase thereof by the Corporation of *Oldham* hereinafter mentioned, was maintained by the trustees or their successors in title under the trust deed out of the tolls levied upon the traffic. A footpath was made down one side of the road, and this was left free for foot-passengers, tolls being charged only upon the traffic over the roadway.

After the completion of *Shaw Road*, *Elliott* and other owners of land adjoining the road from time to time erected houses on their land at irregular intervals along the line of and abutting on the road, the property in its vicinity thus gradually losing its agricultural character and becoming absorbed into the town of *Oldham*. The Plaintiff, who had subsequently purchased *Elliott's* land, alleged that the expenditure in the erection of these houses was made upon the faith of the covenants in the above-mentioned conveyances and the provisions of the trust deed, and with the full knowledge and acquiescence of the persons for the time being entitled to *Shaw Road*, such persons being in fact the predecessors in title of the Defendants, the Corporation of *Oldham;* also that the access afforded by *Shaw Road* was essential to the proper use and enjoyment of the houses.

In the year 1865 the *Oldham Borough Improvement Act*, 1865, was passed. Sect. 27 of that Act contained the following provisions as to the "road or street called *Shaw Road*": (1) The corporation were empowered to purchase all rights in or over the said road or street and all rights of levying tolls on the traffic thereon, and the interests of all persons in any tolls so levied; (2) for the purposes of such purchase the said rights and interests were to be deemed lands within the meaning of the Act and any Act incorporated therewith: (3) On the completion of such purchase all the rights and interests aforesaid were to be absolutely extin-

guished, the corporation were to remove all gates, &c., and thenceforth the said road or street was to be a street open to the public and subject to all provisions relative to the sewering, draining and paving of streets not being highways repairable by the inhabitants at large: (4) The corporation's powers of compulsory purchase under this section were not to be exercised after the expiration of five years from the commencement of the Act, and (5) were not to extend to the soil of the said road or street.

By an indenture dated the 21st of April, 1868 (the 27th section of the above Act being then still in force, though from the evidence it appeared that the Plaintiff was not aware of it at the time), in consideration of the sum of £580 paid to the said *John Elliott* by the Plaintiff, *Elliott* conveyed to the Plaintiff in fee simple the said lands called *Higher Moor Fold* and all other the lands of him, *Elliott*, adjoining *Shaw Road*, together with the houses and buildings thereon and the appurtenances. At the time of his purchase the Plaintiff had notice of the conveyances relating to *Shaw Road* as part of his title, and he stated in evidence that the fact that the trustees had to repair the road materially influenced him in making the purchase. After the completion of his purchase the Plaintiff expended a considerable sum in building other houses on the property, and he paid the usual tolls when using the road. Down to the year 1880 *Shaw Road* was kept in repair by the trustees. In that year the *Oldham Improvement Act*, 1880, was passed, which—after referring to the 27th section of the Act of 1865 and reciting that the corporation had not exercised their powers within the period limited by the latter Act, and that a transfer of *Shaw Road* to them without compulsion had been agreed on for the sum of £6000—enacted as follows: Sect. 62, "nothing contained in the Act of 1865 or in this Act shall exclude, limit, or affect the right of the corporation to exercise the powers conferred upon them by sect. 150 of the *Public Health Act*, 1875, as regards the road or street within the borough called *Shaw Road*." Sect. 63, so far as is material was as follows: "With respect to *Shaw Road* the following provisions shall take effect; namely,

"(1) On the corporation paying to the said *Joshua Milne Cheetham*,

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William Taylor, and *Charles Edward Lees*"—the then trustees of the deed of settlement and Defendants in the present action—"or two of them, or to the survivor of them, or to the executors or administrators of the survivor of them, out of the borough fund or borough rate, or out of moneys which the corporation are by this Act authorized to borrow for the purpose, the consideration money aforesaid, and on a copy of this Act being produced to the Commissioners of Inland Revenue, stamped with such an *ad valorem* stamp as would be required by law to be impressed on a deed of conveyance of *Shaw Road* by them or him to the corporation, then and in that case, but not sooner or otherwise, all the rights, interests, property and things comprised in sect. 27 of the Act of 1865, as subsisting at the time of the vesting thereof under this section, and the soil of *Shaw Road*, shall by virtue of this section vest absolutely in the corporation and their successors for all the estate and interest therein of *Joshua Milne Cheetham*, *William Taylor*, and *Charles Edward Lees*, and each of them, their and each of their heirs, executors, and administrators, and of all persons and bodies claiming through or under them:" (2) The receipt of the said trustees for the consideration money paid to be a good discharge; "(3) The persons to whom payment is so made shall hold the money received by them, subject to payment and discharge of all debts and liabilities (if any) properly payable thereout or chargeable thereon, in trust for such persons as are at the time of payment beneficially interested in *Shaw Road*, and according to the proportions or respective amounts of the interests of those persons: (4) On the vesting aforesaid taking effect all rights of levying tolls in respect of traffic on *Shaw Road*, and the interests of all persons in any tolls so levied, shall be by virtue of this section absolutely extinguished."

In November, 1880, and in pursuance of the last-mentioned Act, the corporation paid to the Defendants, the trustees of the deed of settlement, the said sum of £6000 for the purchase of *Shaw Road*, which thereupon became absolutely vested in the corporation as owners thereof. The toll-gates were then removed and tolls ceased to be collected.

On the 2nd of March, 1881, the corporation, acting under the

powers conferred upon them by sect. 150 (1) of the *Public Health Act*, 1875, and reserved to them by sect. 62 of the *Oldham Improvement Act*, 1880, resolved that *Shaw Road*, as not being a highway repairable by the inhabitants at large, should be sewered, drained, paved and otherwise completed to their satisfaction; and accordingly, on the 3rd of June, 1881, notices were served upon the Plaintiff and other owners and occupiers of premises fronting on *Shaw Road*, requiring them to do the work within a specified time. The Plaintiff and the other owners, however, failed to comply with the notices, whereupon the corporation executed the work themselves, and subsequently served notices and took out summonses before the justices against the Plaintiff and the other owners for the recovery of the expenses which had been apportioned on the several frontages. Upon these summonses orders were made for payment, but, pending an appeal, no further steps had been at present taken to enforce such orders.

On the 4th of July, 1883, the corporation duly declared *Shaw Road* a public highway, pursuant to sect. 152 of the *Public Health Act*, 1875, which enacts that, upon such a declaration being made of any "street," "the same shall become a highway repairable by the inhabitants at large."

(1) The material parts of sect. 150 of the *Public Health Act*, 1875, are as follows:—

"Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice." Plans and estimates of the works to be made and referred to in such notice. "If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses . . . ."

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The Plaintiff's grounds for resisting the claim of the corporation were, that he and the other persons served with the notices had no such interest in *Shaw Road* as to render them liable under the *Public Health Act*, 1875, or otherwise, for works executed thereon of the nature alleged by the corporation: that *Shaw Road* was not a "street" within the meaning of the *Public Health Act*, 1875, but that, on the contrary, it was and always had been a road repairable by the owners thereof, and that the corporation, on behalf of the ratepayers or inhabitants at large, having become the owners, the road thereupon became "a highway repairable by the inhabitants at large": and that, as to any portion of the expenses alleged by the corporation to have been incurred in relation to the road and necessary for the maintenance thereof, the corporation, having purchased the road with notice of and subject to the provisions of the trust deed and the conveyances to the trustees, were estopped from making any claim against the Plaintiff and other adjoining owners on account of such expenses, and thus evading liability as assigns of the grantees under the conveyances and trust deed or in respect of covenants running with the land purchased by them the corporation. The Plaintiff further contended, in the alternative, that if the corporation were entitled to be repaid their said expenditure, or any part thereof, as being necessary for the maintenance of *Shaw Road* in good repair, such right constituted a "liability" within the meaning of the provisions of sect. 63, sub-sect. 3, of the *Oldham Improvement Act*, 1880, and that such expenditure was properly payable out of the purchase-moneys in the hands of the trustees, and that the Plaintiff and the other adjoining owners were entitled to have such purchase-moneys or a sufficient part thereof applied in satisfaction of the claim of the corporation by way of indemnity or otherwise.

In order, then, to ascertain the rights of the owners of property fronting and adjoining *Shaw Road*, the Plaintiff brought this action on behalf of himself and all other such owners against the corporation and the trustees, claiming (1) a declaration that the corporation were not entitled to recover from the Plaintiff and other adjoining owners any sums or charges for the bedding or paving of, or execution of repairs upon *Shaw Road*, or other works

necessary for keeping the road in good repair: (2) an injunction to restrain the corporation from proceeding further upon the orders made by the justices, the Plaintiff submitting to any order which the Court might make in the present action for the purpose of finally determining all questions between the parties; (3) in the alternative a declaration that the Defendants, the trustees, were liable out of the purchase-money paid to them by the corporation to keep the Plaintiff and such other owners indemnified against the said charges: (4) to have the trusts of the said purchase-moneys executed by the Court, and accounts thereof directed, and to have provision made thereout to answer such indemnity, or to satisfy the claim of the corporation as a "liability" within the meaning of the *Oldham Improvement Act*, 1880, sect. 63; (5) damages; and (6) costs.

The corporation, in their statement of defence, insisted that at the date of the conveyances and trust deed the land forming the site of *Shaw Road* and the other adjoining lands were agricultural lands of small value, and that the work to be done to the road under the covenants and provisions in such deeds was only applicable to the road and neighbourhood as existing at that time, and that owing to the subsequent entire change in the character of the neighbourhood consequent upon the growth of population, the erection of buildings and improvements within the township and borough of *Oldham*, and otherwise, such covenants and provisions at the time of the purchase of the road by the corporation ceased to be applicable or to have any binding effect, and had in fact wholly lapsed: that the Plaintiff purchased with full knowledge (which, however, the Plaintiff denied) that under the *Oldham Borough Improvement Act*, 1865, s. 27, the corporation were empowered to purchase all rights over *Shaw Road* within the period of five years: also that the Plaintiff purchased with notice of the liability to the payment of tolls in respect of *Shaw Road*, and of the fact that the said covenants and provisions relating to the maintenance and repair of the road and the liability of the trustees thereunder had wholly lapsed and ceased to be binding. They also asserted that the work executed by them in making *Shaw Road* under their statutory powers was entirely different from that provided for by the said covenants and provi-

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sions, which had become wholly inapplicable and inoperative: that at the time they purchased *Shaw Road* it was not a highway repairable by the inhabitants at large, but was liable to be paved, sewered, and put into thorough repair, under the provisions of sect. 150 of the *Public Health Act*, 1875, at the expense of the adjoining owners: that, even if the covenants in the said conveyances were binding, the Plaintiff and the other owners had forfeited all right to relief thereunder by laches and delay in standing by and permitting the *Oldham Acts* of 1865 and 1880 to pass into law without objection, in making no objection to the notices served on them by the corporation, and in permitting the corporation to execute the work without contesting their right to do so: and they submitted that if the said covenants and provisions were binding on the trustees, and if the moneys due from the Plaintiff and the other adjoining owners to the corporation constituted "debts and liabilities" within the meaning of sub-sect. 3 of sect. 63 of the *Oldham Act* of 1880, then that the same were payable to the Plaintiff and the other owners out of the purchase-money in the hands of the Defendants, the trustees, and not by the corporation.

Issue having been joined, the action came on for trial on the 30th of April, 1884, before the Vice-Chancellor of the County Palatine of *Lancaster*, who held that the Plaintiff's case failed against all the Defendants, and dismissed the action with costs.

The Plaintiff appealed. The notice of appeal was served upon the Defendants the corporation only.

Henn Collins, Q.C., and *Maberly*, for the Appellant:—

Two questions arise in this case: first, as to the meaning of sect. 150 of the *Public Health Act*, 1875; and, secondly, as to the equities arising out of the covenants and agreements contained in the trust deed and the conveyances of the sites for *Shaw Road*.

First, *Shaw Road* is no doubt a "street" within sect. 150 of the *Public Health Act*, according to the interpretation clause, sect. 4, and *Taylor* v. *Corporation of Oldham* (1). Then the effect of the trust deed and the conveyances was to constitute *Shaw*

(1) 4 Ch. D. 395.

Road a turnpike road dedicated to the public, or with a public right of user: *Northam Bridge and Roads Company* v. *London and Southampton Railway Company* (1). A road dedicated to the public, although subject to tolls, is a common highway: *Reg.* v. *Inhabitants of Lordsmere* (2). Even before the *Highway Act*, 1835 (5 & 6 Will. 4, c. 50), by common law any road dedicated to the public became *ipso facto* repairable by the inhabitants at large, and the taking of tolls was merely in relief or diminution of the public burden thrown upon the parish of repairing the road so dedicated to the public: *Rex* v. *Inhabitants of Netherthong* (3). *Shaw Road*, then, is "a highway repairable by the inhabitants at large," and as such is excluded in express terms from the operation of sect. 150, and is subject to the previous sects. 144 to 148 which deal with "highways."

[LINDLEY, L.J.:—In the cases referred to the turnpike roads were constituted under Acts of Parliament. Is there any authority that an individual or body of individuals can, without the sanction of the Legislature, dedicate a road to the public subject to tolls?]

There is no direct authority; but Lord *Abinger* in giving judgment in the *Northam Bridge Case*, says the question whether a road is a turnpike road is not to be determined merely by reference to the Act 13 Geo. 3, c. 84 (the earliest general turnpike Act), or any other Act of Parliament.

Here there is an absolute dedication without tolls at all events for foot-passengers.

[FRY, L.J., referred to *Vin.* Abr. (4).]

The effect of sect. 150 of the *Public Health Act* as regards this turnpike road is not cut down by reason of the definition of a "street" in sect. 4 as including "any highway (not being a turnpike road)": *Nutter* v. *Accrington Local Board of Health* (5). But if the Court should be against us on the question of dedication, and should hold that this road is not a highway repairable by the inhabitants at large, then our second contention is that

(1) 6 M. & W. 428, 438.
(2) 15 Q. B. 689.
(3) 2 B. & Ald. 179.
(4) Tit. "Toll Traverse."
(5) 4 Q. B. D. 375, 385.

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the corporation have taken this road with all the obligations that were imposed upon the persons under whom they claim, namely, the trustees, including the agreements and covenants contained in the trust deed and conveyances for the maintenance and repair of the road, and therefore they cannot charge us with the costs of repair. The trustees were clearly bound to repair, and the corporation as purchasers from them can be in no better position. The benefit of the covenant to repair contained in the conveyance enures for the benefit of the assigns of the covenantee: *Cooke* v. *Chilcott* (1); *Aspden* v. *Seddon* (2), and will in fact pass to successive assignees of the covenantee according to the 7th resolution in *Spencer's Case* (3). And not only does the benefit of the covenant run with the land retained by us and adjoining the road, but also the burden of it runs with the land bought by the corporation: *Holmes* v. *Buckley* (4); *Morland* v. *Cook* (5); *Western* v. *Macdermott* (6); *Cooke* v. *Chilcott*; *Milnes* v. *Branch* (7). The corporation took the land subject to all the equities affecting the trustees from whom they purchased: *Nicoll* v. *Fenning* (8); and according to *Tulk* v. *Moxhay* (9), they are bound by notice of the covenant, though we admit that the authority of the latter case, as applicable to covenants of this description, is somewhat shaken by *Haywood* v. *Brunswick Permanent Benefit Building Society* (10).

[They also referred to *Rickards* v. *Bennett* (11), and *Gunning* on Tolls (12).]

Cookson, Q.C., and *Pankhurst*, for the Respondents the Corporation:—

If the Plaintiff was aggrieved at the decision of the Justices his course was to have appealed to the Local Government Board, the remedy expressly provided by sect. 268 of the *Public Health Act*, 1875. Not having given notice of objection to the notice

(1) 3 Ch. D. 694.
(2) 1 Ex. D. 496.
(3) 5 Rep. 16 a; 1 Sm. L. C. 8th Ed. p. 68.
(4) 1 Eq. C. Ab. 27.
(5) Law Rep. 6 Eq. 252.
(6) Law Rep. 1 Eq. 499; 2 Ch. 72.
(7) 5 M. & S. 411.
(8) 19 Ch. D. 258.
(9) 2 Ph. 774.
(10) 8 Q. B. D. 403.
(11) 1 B. & C. 223, 235.
(12) Pages 36, 37.

served upon him by the corporation to level, &c., the road, he is now estopped from shewing that the road is not a highway repairable by the inhabitants at large: *Reg* v. *Livesey* (1).

[COTTON, L.J.:—We do not think the Plaintiff's objection to the exercise by the corporation of the powers given by sect. 150 of the *Public Health Act* can be sustained. We therefore wish you, Mr. *Cookson*, to confine yourself to the question whether the benefit and the burden of the covenant run with the land.]

The covenant is to maintain an agricultural road only, and has become inapplicable to the present condition of the district. The works we have executed are such as are usual in a street of a town, and are entirely different from those contemplated by the covenant. There is no authority that such a covenant as this runs with the land at law. As regards the benefit of the covenant running with the land of which the Plaintiff is owner, it is merely a collateral covenant; or at all events it is partly collateral and partly incident; it does not wholly touch or concern the land; and such a covenant, according to *Spencer's Case* (2), does not run with the land. *Western* v. *Macdermott* (3) does not assist the Plaintiff, for there the covenant was a negative covenant. Neither, according to the most modern authorities, does the burden of such a covenant run with the land. *Cooke* v. *Chilcott* (4) is virtually overruled by *Haywood* v. *Brunswick Permanent Benefit Building Society* (5), where the Court of Appeal held that a covenant involving expenditure of money, as in the present case, cannot be enforced against an assignee. As it was said by the Court of Appeal in that case, "The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing which would justify us in going that length." And in *London and South Western Railway Company* v. *Gomm* (6) it was held that the doctrine of *Tulk* v. *Moxhay* (7) only applies to restrictive covenants and not to covenants to do acts relating to the land. Moreover, *Cooke* v. *Chilcott* was a case

(1) 22 L. T. (N.S.) 470.
(2) 5 Rep. 16 a; 1 Sm. L. C. 8th Ed. p. 68.
(3) Law Rep. 1 Eq. 499; 2 Ch. 72.
(4) 3 Ch. D. 694.
(5) 8 Q. B. D. 403, 409.
(6) 20 Ch. D. 562.
(7) 2 Ph. 774.

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of implied grant rather than covenant, and so was *Morland* v. *Cook* (1), where the covenant was that a rent-charge should issue out of the land for the repair of a sea-wall, so that the covenant was in distinct terms annexed to the land. *Holmes* v. *Buckley* (2) was a somewhat similar case, though there the covenant enforced was for clearing a watercourse. The ground, however, of the decision in that case is not altogether clear, and it may be doubted whether a covenant would run with an easement such as a watercourse. The sounder view seems to be that a mere grantee of an easement could not avail himself of the first resolution in *Spencer's Case* (3).

Again, in *Keppell* v. *Bailey* (4) it was held that the burden of a covenant to do certain acts does not run with the land. Even upon the language of the covenant in the present case it is clear that there is no equity attaching to the Plaintiff's land. The trustees' covenant with the Plaintiff's predecessor is that the road shall be for ever kept open and used as a road for the use of the public (subject to the tolls), and that they will at all times keep it in good repair and condition. It was only indirectly that the Plaintiff's predecessor got the benefit of the covenant. It was not a covenant relating to his land, but amounted merely to a stipulation that the trustees should keep the road in usable condition. It does not refer to the land in any way. There is no authority that such a covenant runs with the land, and this case is totally different from *Spencer's Case* and *Morland* v. *Cook*. It is not a covenant the benefit of which necessarily touches the Plaintiff's land: nothing is to be done on the land or in connection with it.

Again, it is clear that when the Plaintiff purchased from *Elliott* in 1868 he must be taken to have been aware that under the *Oldham Act* of 1865 the corporation had power to purchase the road, and that the covenant on which he now relies would have been extinguished if that power was exercised. He might therefore have taken steps to protect himself, but he failed to do so, even under the provisions of sect. 63 of the later Act of 1880. He is therefore now too late.

(1) Law Rep. 6 Eq. 252.
(2) 1 Eq. C. Ab. 27; 1 Sm. L. C. 8th Ed. p. 94.
(3) 5 Rep. 16 a; 1 Sm. L. C. 8th Ed. p. 68.
(4) 2 My. & K. 517.

Collins, in reply:—

If I am compelled to contribute towards the repairs of this road, I rely on the covenant at all events as regards part of them, and ask that, in so far as the expenses are covered by the covenant, they may be borne by the corporation. If it should be held that the burden of this covenant does not run with the land taken by the corporation, it would be equivalent to holding that in no case can such a covenant run, except as between landlord and tenant. I submit that here there is a covenant sufficiently specific to create a burden on the land. I concede that, to entitle me to sue on the covenant, I must shew that the benefit of it, as well as the burden, runs with the land. Now here is a road running through my land and which is necessary for access to my land. I have also a right of frontage of great value on to that road. Can it be said that a covenant to repair and keep open that road is not a covenant for the benefit of my land, and that it does not touch or affect the land?

[FRY, L.J.:—Is there a single case in which it has been held that the burden and the benefit of a covenant both run?]

Yes: *Cooke* v. *Chilcott* (1) and *Holmes* v. *Buckley* (2). The former case has not been overruled by *Haywood* v. *Brunswick Permanent Benefit Building Society* (3): on the contrary, Lord Justice *Lindley* there said he "should be sorry to overrule it," pointing out that the circumstances of that case were "wholly different" from those in the case before him.

Another view of the covenant is that it constitutes a grant of a right of way, the grantors being bound to repair the way: *Gale* on Easements (4), citing *Rider* v. *Smith* (5).

COTTON, L.J.:—

This is an appeal by the Plaintiff against the decision of the Vice-Chancellor of the County Palatine, who did not grant the relief which he sought. The nature of the case is this: The Plaintiff is the owner of land lying on two sides of what is now a

(1) 3 Ch. D. 694.
(2) 1 Eq. C. Ab. 27.
(3) 8 Q. B. D. 403, 409.
(4) 5th Ed. p. 545.
(5) 3 T. R. 766.

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street in *Oldham;* he had got a notice from the corporation, under the 150th section of the *Public Health Act*, 1875, to do certain work, which, if the road or street is within that section, they are entitled to require to be done, in the nature of paving and sewering the street. He did not do it; then they executed the work, and sought to recover from him, in the way pointed out by the Act, his proportion of the expense which they had incurred in paving and sewering the road or street, part of which divided his property. He contended before the Vice-Chancellor unsuccessfully, and has contended on appeal, that for various reasons the corporation had no power to put in force against him sect. 150 of the *Public Health Act*, 1875, and the consequential powers given by that Act in respect of work done under that section. That was, of course, saying "you have no right at all as against me to claim any part of this money;" but there was also a subsidiary point. He contended that, if he was wrong on the first point, yet they were only entitled to claim from him the expense of part of the work which they had done, on the ground that under the deed which I shall have to refer to, the corporation were bound to bear the remainder of the expense under a covenant entered into by their predecessors in title.

Now, the point first argued was as to the general power under sect. 150 of the *Public Health Act*, 1875. [His Lordship read the section and continued:—] Of course, if *Shaw Road* is not a street within this section, the corporation have no power at all to give the notice under it or to do the work with the consequential result of being able to claim from the Plaintiff any proportion of the expense. Now, the Plaintiff's contention was this:—It was admitted that it was a street, but it was said that the 150th section only applies to streets not being highways repairable by the inhabitants at large, and that this street was "a highway repairable by the inhabitants at large:" that before it became vested in the corporation it had been a turnpike road—a highway—and, therefore, being a highway, was repairable by the inhabitants at large. Well, is that so? It appears that this street was originally made as a matter of private adventure by persons who had formed themselves into a joint stock company. There was a line of road agreed upon, which would cut off a great angle, and make a very much shorter

line of access than had existed previously; and apparently the landowners on the line of that contemplated new road joined together and formed a joint stock company in order to make this road, and to put upon it bars, which they did not allow people to pass unless they paid money. It was said that that alone made it a turnpike road. I will not enter into the question as to whether that made it a turnpike road, because certainly that is not the question we have to deal with. It did not make it a turnpike road in the sense of a turnpike road made such by Act of Parliament, which by Act of Parliament is dedicated to the public; or rather, a road which by Act of Parliament—although there is no expressed dedication—is constituted a public highway, subject only to the obligation imposed by the Act of payment to the trustees of the road of certain tolls. But the question we have to consider is this: Was the road at the time when the corporation acquired it under the Act which has been referred to, a road, whether turnpike or not, repairable by the inhabitants at large? That, in my opinion, depends upon this further question—was it really dedicated to the public so as to make it a public highway? The Vice-Chancellor considered that on the true interpretation of the 150th section, the road was not repairable by the inhabitants at large, and that if it was repairable under the trust deed out of the tolls, it was not within the exception in the section. I do not give any decision upon that question, because in my opinion this road was never dedicated to the public in such a way as to become a public highway, repairable as such by the inhabitants at large.

I have mentioned how it was that this road came to be formed, and we have before us the deed of settlement of the company of proprietors. It mentions the object of making this road, that the parties had agreed to raise the necessary capital, and that the road, when made, should not only be enjoyed by them "for their individual purposes, but (subject as hereinafter is mentioned) shall be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road." It was contended that those words dedicated it to the public, that it then became a public highway, and that consequently it would be repairable by the inhabitants at large. But though there are the words, "shall be open to the use of the public at large," there are also the words

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"subject as hereinafter is mentioned," and we must look to see what is "hereinafter mentioned." We then find this—"that no person or persons (except such persons and for the purposes only as are mentioned in the said several conveyances of the said land so purchased by the company as aforesaid) shall be allowed to travel upon, use, or enjoy any part of the said road, or pass through any such tollgate, side-bar, or chain, to be erected and set up as aforesaid, without having previously paid such toll as may from time to time be demanded of him, her, or them, pursuant to the table of tolls for the time being authorised by the said company to be demanded and taken as aforesaid." Now the exception there is this, that the persons who conveyed their lands to the trustees for the site of this road reserved for themselves, by covenant on the part of the trustees, a right to use the road as a road for agricultural purposes free of toll; that is, for carts to pass for any purpose of agriculture connected with their land; but subject to that they and everybody else can only use it if they are willing to pay a toll, and it is not a fixed toll, but the "tolls for the time being authorised by the said company to be demanded and taken as aforesaid." Now I here give no opinion as to whether there can be a dedication by an individual of a road as a highway subject to a toll without the aid of an Act of Parliament. Authorities were cited containing some passages apparently to the effect that this might be done. I do not think it necessary in this case to give any opinion upon that point, though I certainly hesitate to say, and I do not in any way encourage the idea, that an individual without any authority from the Crown, and without the authority of an Act of Parliament, can be said to dedicate a road to the public when it can only be used on payment of a toll; but if this is a highway, it would be an infringement of the prerogative to stop the Queen's subjects on it and demand toll from them, either in consequence of any repairs which might be done or any improvements which might be made. If it is once a highway there can be no question of toll after that. Whether originally a road could be dedicated to the public so as to become a highway subject to a toll to be paid to the man who dedicates it, I give no opinion, because it has not been really fully discussed. But here the case is very different; it is not that all the public

are to use the road, but only such persons are to use it as are willing to pay this toll—"that no person or persons . . . . shall be allowed to travel upon, use, or enjoy any part of the said road, or pass through any such tollgate, side-bar, or chain to be erected and set up as aforesaid without having previously paid such toll," and it is not a fixed toll, but it is "such toll as may from time to time be demanded from him, her, or them, pursuant to the table of tolls for the time being authorised by the said company, to be demanded and taken as aforesaid." So that this company, formed for the profit of the individual shareholders—because the deed of settlement shews that they contemplated realizing a profit and making a dividend—are from time to time to charge such tolls as they may think fit, not merely for the purpose of keeping up the road, but for the purpose of keeping the road open, as a source of profit to them, as well as a matter of convenience to those members of the public who may be willing to pay such tolls as they may from time to time fix. They might increase the tolls from time to time, and there is no limit, except their own interest, placed on the tolls; and though it is true that, as far as it was a footpath, there never has been any toll, yet under the deed of settlement they were at liberty, if they thought fit, to charge a toll on that footpath as well as any other part of the road. However, down to the time when the corporation got this road, they did not charge anything on the footpath; but there was nothing, as I say, to prevent them from so doing. In my opinion there was no such dedication to the public as to make this a public highway, and consequently it does not come within the exception of sect. 150 of "a highway repairable by the inhabitants at large."

Then comes this other point. Assuming that this corporation had the power to act under sect. 150, it was said that when the land, forming the portion of the road about which this question arises, was originally purchased from Mr. *Elliott*—he being one of those over whose land the new road went—there was a covenant by the trustees who bought on behalf of the joint stock company to preserve and maintain it as a road. The covenant was by those trustees with *John Elliott*, his heirs and assigns, that they should, within the space of three years, at their own cost, make and form and fence off in a good and workmanlike manner the road; and

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then it goes on to prescribe the mode of making the road, and "that the said line shall from and immediately after the expiration of the said term of three years (subject, nevertheless, to such toll for horses, cattle, beasts, carts, and carriages passing thereon as may by the said *Joshua Milne*, *John Milne*, and *Samuel Lees* (who are the trustees), their heirs and assigns from time to time be fixed and determined upon) be used by the public, and shall and will for ever hereafter be kept open and used as and for a road for the use of the public (subject as aforesaid), and also that they, the said *Joshua Milne*, *John Milne*, and *Samuel Lees*, their heirs and assigns, shall and will from time to time, and at all times hereafter, keep and maintain the said road and every part thereof in good repair, order, and condition." It is said that, this covenant having been entered into by the trustees, the corporation, as purchasers from them, are now subject to that covenant. The corporation bought this road under an Act of Parliament which was passed in the year 1880. I do not think it necessary, in the view I take of this case, to go in detail into that Act of Parliament, but sect. 63 gives the power of purchase. There had been a previous Act which had given them the right to enter into a contract with the trustees for the purchase of this road; they had not done that, and then sect. 63, with respect to this road, which is called *Shaw Road*, gave them this power, that on their paying to the trustees out of the borough funds, or the moneys borrowed, the consideration money which they were to pay, and, on a copy of the Act being produced to the Commissioners of Inland Revenue (duly stamped), "then, and in that case, but not sooner or otherwise, all the rights, interests, property, and things comprised in sect. 27 of the Act of 1865" (that was the previous Act), "as subsisting at the time of the vesting thereof under this section, and the soil of *Shaw Road*, shall by virtue of this section vest absolutely in the corporation, and their successors for all the estate and interest therein" of the trustees.

It seems by the immediately preceding section that this Act contemplated that probably the corporation might have power to exercise the rights given by sect. 150, but in the view which I take of this case I shall not enter minutely into that question, or as to the general effect of this Act of Parliament with regard to the

question in dispute. But it is said, on behalf of the Appellant, here is this covenant by the trustees; the corporation are their successors under that Act of Parliament, taking all the estate and interest of the trustees in *Shaw Road*, and, that being so, they must be bound by the covenant: it is a covenant the burden and benefit of which run at law, or at least in equity, they having taken with notice, which undoubtedly they did; and, if not enforceable at law, it is a covenant which can be enforced in equity, and the consequence must be that they cannot claim under the *Public Health Act*, 1875, the expense of repairing this road, or, at any rate, they cannot claim from the Plaintiff the full amount, but only such proportion as would meet the amount that would have been required to put the road in the state of repair required by the covenant with Mr. *Elliott*, through whom the Plaintiff claims. Now, as to enforcing this covenant in equity, I will deal with that point first. In my opinion, if this is not a covenant running at law, there can be no relief in respect of it in equity; it is not a restrictive covenant; it is not a covenant restraining the corporation or the trustees from using the land in any particular way, at least so far as this case is concerned. If either the trustees or the corporation were intending to divert this land from the purpose for which it was conveyed, that is, from its being used as a road or street, that would be a very different question; then one would have to consider this—how far, having regard to the Act of 1880, the equitable right would travel; because, undoubtedly, where there is a restrictive covenant, the burden and benefit of which do not run at law, Courts of Equity restrain anyone who takes the property with notice of that covenant from using it in a way inconsistent with the covenant. But here the covenant which is attempted to be insisted upon on this appeal is a covenant to lay out money in doing certain work upon this land; and, that being so, in my opinion—and the Court of Appeal has already expressed a similar opinion in a case which was before it—that is not a covenant which a Court of Equity will enforce: it will not enforce a covenant not running at law when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor, to spend money, and in that way to undertake a burden upon themselves. The covenantor must not use the

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property for a purpose inconsistent with the use for which it was originally granted: but in my opinion a Court of Equity does not and ought not to enforce a covenant binding only in equity in such a way as to require the successors of the covenantor himself, they having entered into no covenant, to expend sums of money in accordance with what the original covenantor bound himself to do. The case principally relied upon by the Appellant was one before Vice-Chancellor *Malins*. That was the case of *Cooke* v. *Chilcott* (1). Now undoubtedly the Vice-Chancellor did decide that case on the equitable doctrine, and said that he would enforce the covenant; but that is an authority which in my opinion was not right on that point. In the subsequent case of *Haywood* v. *Brunswick Permanent Benefit Building Society* (2)—both Lord Justice *Lindley* and myself were members of the Court which decided that case — we expressed our opinion against *Cooke* v. *Chilcott* being a correct development of the doctrine established by *Tulk* v. *Moxhay* (3), or for which *Tulk* v. *Moxhay* was an authority.

Then there was another case, before the late Lord *Romilly*, of *Morland* v. *Cook* (4), which was relied upon; but that was really a case not turning upon that doctrine, because it was this: There was a deed of partition of land all of which was below the sea level and was protected by a river or sea wall, and a covenant was entered into by the different parties to pay their proportion of the expense of repairing the sea wall, whoever should do it; and that covenant was enforced for and against the successors of those who were parties to the deed. But in that case it appeared that there was, according to the view of the Master of the Rolls, a common law liability, independently of that covenant, to repair the sea wall, so that it would be very different from the case of creating a new liability: the covenant there was framed in such a way as to create a grant by the different persons who took, on partition, portions of the property, of a rent-charge out of their lands in order to provide for the expense. The covenant was in this form. The parties covenanted for themselves, &c., "severally and respectively, in manner following, that is to say, that the charges, damages, and expenses of or attending the keeping and maintain-

(1) 3 Ch. D. 694.
(2) 8 Q. B. D. 403.
(3) 2 Ph. 774.
(4) Law Rep. 6 Eq. 252.

ing the walls and gutts of or belonging to the said lands, fresh marsh lands, hereditaments and premises hereby granted and released, or intended so to be, in good order and repair, shall be borne and paid by them (naming them), their respective heirs and assigns, out of the said lands and hereditaments hereby divided in proportion, and by an acre-scot to be from time to time for that purpose made thereon and payable thereout in the same proportions in ready money." So, although in terms it was a covenant, it was a covenant by these parties that the expense should be paid out of their proportions of the land by an acre-scot payable thereout in the same proportions in ready money. That is, therefore, really a grant by each of the parties of a rent-charge of so much money as would be equivalent to his proportion of the total expense of repairing the sea wall.

Those, I think, were the principal cases which were relied upon. As to the case of *Holmes* v. *Buckley* (1), although that was a case which came from equity, yet I apprehend it was not decided on the ground taken in *Tulk* v. *Moxhay* (2); therefore, I do not think it necessary on this part of the case to refer to that decision. In my opinion, therefore, if the Plaintiff here cannot say he is entitled at law to sue on the covenant, he cannot have any relief on the equitable doctrine of *Tulk* v. *Moxhay*.

Then, is there here a covenant enforceable at law? For this there are two things to be considered—the burden of the covenant, and the benefit of the covenant; and unless the Plaintiff can shew, he being an assign of the original covenantee, that he is entitled to the benefit of the covenant, and unless he can also shew that the corporation, being assigns of the original covenantor, are subject to the burden of the covenant, he cannot establish in this Court any covenant which can be enforced at law. If the Plaintiff fails in either of these two points, he fails on this part of the case. As I think my learned brethren will consider more particularly the question whether this burden runs with the land, I do not propose to enter into this part of the case. If I had to do so, I ought to give my opinion upon the debated point whether the burden of a covenant can properly run with the land; and for that purpose I should like, before giving any opinion on the subject,

(1) 1 Eq. C. Ab. 27. (2) 2 Ph. 774.

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to consider the authorities which are supposed to lay down the proposition that it can; but I in no way say that the burden of a covenant can be so annexed to the land as to run properly with the land. But does the benefit of the covenant in the present case run with the land? In order that the benefit may run with the land, the covenant must be one which relates to or touches and concerns the land of the covenantee. Here, undoubtedly, what was to be done was not to be done on the land of the covenantee at all, but simply on the land of the purchasers from him—these trustees; and when we look at the particular form of covenant entered into with him it is clear that it was not pointedly with reference to his land that this covenant was entered into—it was a covenant that this strip of land should be kept as a road for the use of the public. Of course that was insufficient to dedicate it as a public highway so as to make it repairable by the parish, for it was only a matter of covenant as between him and the purchasers from him. Looking at the terms of the covenant, it is rather a covenant for the benefit of such of the public as might be willing to use this road, not a covenant having a direct reference to the land, or the enjoyment or the benefit of the land, of the covenantee, the predecessor in title of the Plaintiff. There was undoubtedly a reservation to the covenantee which was for the benefit of his land and the occupiers of it in relation to his right to cross this road in respect of and for agricultural purposes without paying tolls; but it is conceded that this right or easement, or whatever it was, is gone, and here we are dealing with a covenant in which the public is constantly referred to, not the owners and assigns of the land. The words are, "shall and will for ever hereafter" (that is, the road) "be kept open and used as and for a road for the use of the public." That shews this, that although the covenantee thought it would benefit himself and the other owners of the adjoining lands to have a road which they as members of the public might use, this covenant is not a covenant which was made and entered into in such a way as that it relates to or touches and concerns the land reserved by the covenantee. In my opinion, therefore, the Plaintiff fails to make out that the benefit of this covenant can be said so to run with the land as to enable him, as the assign of the covenantee, to maintain this

action. That being so, I think I need scarcely go through many of the cases; but some of them, perhaps, one ought to mention. *Holmes* v. *Buckley* (1) is one. It is doubtful whether that case was decided on the ground that the covenant ran with the land, because there the land of the plaintiff was nothing but the easement of a watercourse; and it is suggested that that decision really must not be looked upon as an authority that the benefit of the covenant would run with such an easement; but I should think myself that the watercourse must have been used to convey water to adjoining land of the plaintiff, and probably it was in respect of that land that the covenant was said to run with the land. However, I will not enter further into that case, because one of my learned brethren will do so more fully; but even if that is an authority as to the burden or the benefit of a covenant running with or against the land, one can see it has no application to the point on which I decide this case, because there the watercourse must undoubtedly have been for the benefit of the adjoining land of the grantee.

Then as to the other case of *Morland* v. *Cook* (2), I have explained what the case really is, and although Lord *Romilly* did decide that the covenant would run with the land, I do not think, having regard to the explanation which I have given, one need consider that an authority which ought to trouble one either as regards the benefit to or burden of the covenant; but, as regards benefit, a covenant for the keeping up of a sea wall which would prevent the land in question owned by the plaintiff from being flooded was undoubtedly a covenant with reference to the benefit to be enjoyed by the land by the keeping of the sea out.

Then *Western* v. *Macdermott* (3) was another decision of Lord *Romilly*, and he did express his opinion that there the covenant ran with the land; but there the covenant was one which was much more pointedly and directly for the benefit of the land of the plaintiff, or the predecessor in title of the plaintiff, because it was a covenant not to build on adjoining land, the evidence being that it was not for the benefit of mere members of the public

(1) 1 Eq. C. Ab. 27. (2) Law Rep. 6 Eq. 252.
(3) Law Rep. 1 Eq. 499; 2 Ch. 72.

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other than the owner of the adjoining land, but to prevent the adjoining land being made less commodious by the erection of buildings on the land of the covenantor.

Then there is the case of *Cooke* v. *Chilcott* (1), which was before *Malins*, V.C., where he likewise expressed an opinion that the covenant ran with the land. He did not base his opinion on the cases I have mentioned, but the case was one in which there was very little, if any, difficulty as regards the benefit of the covenant touching and relating to land of the plaintiff, because it was to erect a pump and pump water from the land of the defendant's predecessor in title to the land of the plaintiff's predecessor in title, and there was reference to the benefit of the land, which shewed that that was the object of the covenant. As to whether it was right to express any opinion as to the burden running with the land I say nothing; but there is no authority which can in any way interfere, when fairly regarded, with the opinion which I express, that the covenant in the present case was neither in terms nor in its obvious sense such as to be a covenant relating to, or touching and concerning, the land of the Plaintiff's predecessor in title. So, in my opinion, this point that there is a covenant on which the Plaintiff can sue the corporation at law is one which cannot be maintained, and, so far as this case depends on that, in my opinion the appeal fails. If one had been of opinion that either at equity or at law the Plaintiff could have relied on this covenant as against the corporation, it would have been necessary to consider what would have been the effect of the 268th section of the *Public Health Act*, 1875, which points out what is to be done if a person charged considers that he has been charged too much; but as I decide this case on the other point, that neither in equity nor law can the Plaintiff successfully rely on this covenant, I think it is not necessary to enter into the question as to how far that section would prevent him from arguing the contention before us that what he has been called upon to pay should be reduced by striking off such proportion of this expense as is attributable to repairs which ought to be done by the trustees under the deed of covenant.

(1) 3 Ch. D. 694.

LINDLEY, L.J.:—

The controversy in this case has arisen in this way: There is a road called *Shaw Road*, in *Oldham*, and the Defendants, who are the Corporation of *Oldham*, have recently paved, flagged, sewered, and repaired it. The Plaintiff has some land adjoining the road, and the corporation have sought to charge him with what would be, under ordinary circumstances, his share of so making the road, paving, and draining it. He says that the corporation have no right to charge him with any of that expense; and he says, if they have, they have no right to charge him with the whole of it. Now, the first point, whether they have a right to charge him with any of it, depends upon the question whether this *Shaw Road* is or is not "a highway repairable by the inhabitants at large" within the meaning of sect. 150 of the *Public Health Act*. Mr. *Austerberry* maintains that it is a highway repairable by the inhabitants at large. The Vice-Chancellor has expressed a doubt whether that expression in sect. 150—"highway repairable by the inhabitants at large"—is synonymous with all highways; whether it does not mean highways repairable by the inhabitants at large primarily, and whether the turnpike roads, and so on, which are primarily repairable by the public, though they may be repairable at common law by the inhabitants at large, are within that expression. I think there is some doubt about that, but it is unnecessary to decide the question for the reasons that have been mentioned at length by Lord Justice *Cotton*, and to which I will very shortly refer.

I think it is very doubtful, but it is unnecessary to decide, whether it is possible to dedicate to the public a highway subject to a toll. I do not say it is not, but I am very far from saying that it is. But whatever doubt there may be upon that point, which, if we had to decide it, I should like to investigate further, it appears to me impossible to hold that a highway is dedicated to the public subject to a toll which may fluctuate from day to day. This highway was constituted under a trust deed giving the trustees a power to levy tolls if they liked, and to change them whenever they liked; and it appears to me quite impossible not to see that that is not a dedication to the public—it is

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liberty to such of the public as choose to pay the toll to use the road—that is all. I cannot come to the conclusion that the road ever was dedicated to the public. That appears to me to be the short answer (I need not go further into it) to the first point; and in my opinion this road is within sect. 150 of the *Public Health Act*, and upon the first point the corporation is right.

But then arises another and a totally different point. The Plaintiff says:—"You, the corporation, have bought or acquired this road under an Act of Parliament which places you in the position of, and in no better position than, those from whom you got it; you acquired it from certain trustees, and those trustees covenanted with my predecessors in title to keep this road open for the public, and to repair it: You are bound by that covenant to repair, and I am in a position to enforce against you that covenant." First it seems to have been thought that that covenant was so worded as to cover everything which the corporation had done—I mean by "everything" the metalling, and paving, and sewering; but when the covenant is looked at it is seen that it is not extensive enough to cover that; and, therefore, whatever may be the merits of the case, the corporation must be right as to a great portion of the charges made against the Plaintiff. But then there is the covenant which extends (to use a short word) to repairing and the Plaintiff says that at all events to the extent to which you, the corporation, have incurred expense in repairing the road, to that extent you are bound to exonerate me by virtue of that covenant. That gives rise to one or two questions of law.

The first question which I will consider is whether that covenant runs with the land, as it is called—whether the benefit of it runs with the land held by the Plaintiff, and whether the burden of it runs with the land held by the Defendants; because, if the covenant does run at law, then the Plaintiff, so far as I can see, would be right as to this portion of his claim. Now, as regards the benefit running with the Plaintiff's land, the covenant is, so far as the road goes, a covenant to repair the road; what I mean by that is, there is nothing in the deed which points particularly to that portion of the road which abuts upon or fronts the Plaintiff's land—it is a covenant to repair the whole of the road, no

distinction being made between the portion of that road which joins or abuts upon his land and the rest of the road; in other words, it is a covenant simply to make and maintain this road as a public highway; there is no covenant to do anything whatever on the Plaintiff's land, and there is nothing pointing to the Plaintiff's land in particular. Now it appears to me to be going a long way to say that the benefit of that covenant runs with the Plaintiff's land. I do not overlook the fact that the Plaintiff as a frontager has certain rights of getting on to the road; and if this covenant had been so worded as to shew that there had been an intention to grant him some particular benefit in respect of that particular part of his land, possibly we might have said that the benefit of the covenant did run with this land; but when you look at the covenant it is a mere covenant with him, as with all adjoining owners, to make this road, a small portion of which only abuts on his land, and there is nothing specially relating to his land at all. I cannot see myself how any benefit of this covenant runs with his land.

But it strikes me, I confess, that there is a still more formidable objection as regards the burden. Does the burden of this covenant run with the land so as to bind the Defendants? The Defendants have acquired the road under the trustees, and they are bound by such covenant as runs with the land. Now we come to face the difficulty; does a covenant to repair all this road run with the land—that is, does the burden of it descend upon those to whom the road may be assigned in future? We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little, if any, bearing upon the case which we have to consider, and I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rent-charge, or some estate or interest in the land. A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it.

It is remarkable that the authorities upon this point, when they are examined, are very few, and it is also remarkable that in no

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case that I know of, except one which I shall refer to presently, is there anything like authority to say that a burden of this kind will run with the land. That point has often been discussed, and I rather think the conclusion at which the editors of the last edition of *Smith's* Leading Cases have come to is right, that no case has been decided which does establish that such a burden can run with the land in the sense in which I am now using that expression. The case of *Holmes* v. *Buckley* (1) looks a little like it at first; but the observation to be made on that case I think is this: In the first place it is quite plain that there the plaintiff had a cause of action; he was entitled to an injunction of some sort to restrain the defendants from interrupting his watercourse. The right of the plaintiff to enforce specifically the covenant to repair, or rather to cleanse the watercourse, is obscure, and we have not got the decree which was pronounced; and I confess that having only that short note of it which is to be found in 'Equity Cases Abridged,' I fail to understand the exact grounds of that decision, specifically enforcing that covenant to cleanse. I doubt whether it was a decision to that effect; but the case is too loosely reported to be a guide on the point.

Morland v. *Cook* (2), another case in which it was said that the covenant ran with the land, is intelligible on this ground—that there was there that which amounted to the creation of a rent-charge for the repair of the sea wall which was in question. That is intelligible enough, and if the covenant in the present case amounted to anything of the kind, of course the observations I am now making would not be applicable.

The case before Vice-Chancellor *Malins* of *Cooke* v. *Chilcott* (3) has been so shaken that I cannot rely upon it as an authority at all. I think the Vice-Chancellor did intimate an opinion that the covenant there would run with the land. I confess I doubt the correctness of that opinion. He decided the case upon another point, and upon that other point only has it been followed. There is no other authority that I am aware of that such a covenant as this runs with the land, unless it is *Western* v. *Macdermott* (4), where the Court of Appeal did not sanction the notion that the covenant in that case ran with the land, although the covenant was a purely

(1) 1 Eq. C. Ab. 27.
(2) Law Rep. 6 Eq. 252.
(3) 3 Ch. D. 694.
(4) Law Rep. 1 Eq. 499; 2 Ch. 72.

restrictive covenant. I am not aware of any other case which either shews, or appears to shew, that a burden such as this can be annexed to land by a mere covenant, such as we have got here; and in the absence of authority it appears to me that we shall be perfectly warranted in saying that the burden of this covenant does not run with the land. After all it is a mere personal covenant. If the parties had intended to charge this land for ever, into whosesoever hands it came, with the burden of repairing the road, there are ways and means known to conveyancers by which it could be done with comparative ease; all that would have been necessary would have been to create a rent-charge and charge it on the tolls, and the thing would have been done. They have not done anything of the sort, and, therefore, it seems to me to shew that they did not intend to have a covenant which should run with the land. That disposes of the part of the case which is perhaps the most difficult.

The last point was this—that even if it did not run with the land at law, still, upon the authority of *Tulk* v. *Moxhay* (1), the Defendants, having bought the land with notice of this covenant, take the land subject to it. Mr. *Collins* very properly did not press that upon us, because after the two recent decisions in the Court of Appeal in *Haywood* v. *Brunswick Permanent Benefit Building Society* (2) and *London and South Western Railway Company* v. *Gomm* (3) that argument is untenable. *Tulk* v. *Moxhay* cannot be extended to covenants of this description. It appears to me, therefore, that upon all points the Plaintiff has failed, and that the appeal ought to be dismissed with costs.

FRY, L.J.:—

I have very little to do in this case except to express my assent and concurrence with the conclusion of my learned brothers.

Upon the question of dedication, I think it plain that there has been no dedication to the public of the road in question. I doubt whether there can be a dedication of a road to the public with a levy of a toll, unless under a grant from the Crown; but that point is one which it is not needful now to decide. In the present case what is relied upon as a dedication is the language used in the

(1) 2 Ph. 774. (2) 8 Q. B. D. 403. (3) 20 Ch. D. 562.

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deed of settlement; but I regard that as a mere convention between the parties who associated themselves together for a private enterprise and covenanted that they would open the road to the public subject to a toll to be varied from time to time, with an eye, no doubt, to the dividends which they were to declare amongst the shareholders. I consider that they no more dedicated the road to the public than a company formed for the purpose of carrying on a theatre or a pleasure garden dedicates the theatre or the pleasure garden to the public because they agree among themselves that they will admit the public, subject to the payment of a toll.

Upon the second point I have not much to add. It appears to me that the questions are three. In the first place, did the benefit of this covenant run with the land—the land of Mr. *Elliott?* Upon that point my opinion is perhaps not quite as confident as that of my learned brothers. I am rather more inclined to think that the road connecting the land with the public highway was so far an incident to the use and occupation of the remainder of Mr. *Elliott's* land that it might be conceivable that it came within the principles of covenants relating to things incident to the land; but, at the same time, I do not desire to express any difference of opinion upon that. But upon the point whether the burden of the covenant ran with the land of the covenantors, I am clearly of opinion that it did not so run; and I share the doubt which has been expressed by my learned brothers whether in any case, except that of landlord and tenant, the burden of covenants of this description does ever run with the land.

There is one authority which appears to me very closely parallel to the present case. I think the most favourable way of stating the case for the Appellant is to hold that there was the grant by the covenantors to Mr. *Elliott* of a right of way over the land of the covenantors, with a covenant by the covenantors that they would maintain the land subject to the right of way in repair as a road. Now, putting the case in that manner, it is extremely like the circumstances which occurred in the case of *Brewster* v. *Kidgill*, which is best reported in 12 Modern Reports (1). That was a case which came before Lord *Holt* and the King's Bench, and was evidently very elaborately argued. There one *Brewster*, who was seised in fee of a manor, in consideration of £800 granted

(1) 12 Mod. 166.

a rent-charge in fee of £40 per annum, and on the back of the deed was indorsed a memorandum declaring it to be the true intent and meaning of that deed, "that the grantee and her heirs shall for ever hereafter be paid the said rent-charge without any deduction or abatement of taxes, charge or payment out of, for or concerning the said rent, or the said manor or lands charged herewith." The question then arose whether the memorandum was really part of the grant of the rent-charge, or a covenant collateral to the grant. Lord *Holt* conceived it to be a collateral covenant; the other Judges of the King's Bench thought that it was part of the grant. They all agreed in the view that if it was a part of the grant it ran with the land; but that if it was a covenant to pay it did not run with the land. Now what Lord *Holt* said upon that point is this (1): "I make no doubt, but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted; but that covenant should run with the rent against the assignee of the land, I see no reason. If this rent was granted so to be paid, it would be another matter; but here is only a covenant, and no words amounting to a grant; and therefore there can be no relief in this case against the terre-tenant, but," his Lordship added, "in equity;"—I will consider that point presently—"and, therefore for this point I do not see how the plaintiff can have his judgment." The learned Judges differed on the question of construction, but they do not appear to have differed on the point of law which Lord *Holt* discussed.

There remains, therefore, only the question whether there is any relief in equity in a case of this description where there is none at law. The point is not pressed upon us by the Appellant. I do not think it is arguable after the recent decisions. A covenant of this description requiring the outlay of money upon the land is not a covenant which, if it does not run at law, runs at equity by reason of any doctrine such as that in *Tulk* v. *Moxhay* (2). I agree, therefore, that this appeal must be dismissed with costs.

Solicitors: *Sale, Seddon, & Co., Manchester,* for *Wrigley & Morecroft, Oldham; Chester & Co.,* for *H. Booth, Oldham.*

(1) 12 Mod. 170.

(2) 2 Ph. 774.

G. I. F. C.

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Jan. 17, 19.

In re A. D. HOLMES.

Mortgage—Fund in Court—Notice of Prior Incumbrance to Second Incumbrancer—Priority—Stop Order.

A second incumbrancer of a fund in Court, who at the time of taking his security had notice of the existence of the first incumbrance, cannot by obtaining a stop order gain priority over the first incumbrancer, even although the latter never obtains a stop order.

ISAAC Holmes, by his will dated the 17th of September, 1866, bequeathed any property, freehold, leasehold, or any debts owing to him in *England*, *Scotland*, or the *Isle of Man*, to his son, *Melville Holmes*, and his daughter *Eliza Shaw Von Metz*, in trust to divide the whole of such property with their brothers and sisters, excepting their brothers *Henry Holmes* and *James Nathan Holmes*. *Isaac Holmes* died on the 22nd of November, 1871, and his will was proved by the executors thereof, *Melville Holmes* and *Eliza Shaw Von Metz*, on the 19th of July, 1872. *Arnold Decimus Holmes* was one of the children of *Isaac Holmes* and was a brother of *Melville Holmes* and *Eliza Shaw Von Metz*. Pursuant to an order of the High Court of Justice dated the 29th of June, 1877, made in the suit of *Denison* v. *Holmes*, and by the Chief Clerk's certificate made in pursuance thereof and dated the 15th of July, 1880, a sum of £3302 7*s*. 5*d*. became payable to the executors of the will of *Isaac Holmes*, as part of his estate in *England*, and was in the month of October, 1880, received. The share of *Arnold Decimus Holmes* in the said sum of £3302 7*s*. 5*d*. was represented by a sum of £303 13*s*. 7*d*., which the executors of *Isaac Holmes* in 1883 paid into Court under the *Trustee Relief Act* (10 & 11 Vict. c. 96). By an indenture dated the 4th of August, 1876, *A. D. Holmes* had charged his share in the said sum of £3302 7*s*. 5*d*. in favour of *A. Davis*. In the early part of 1877 he also charged his share in that sum in favour of the *Liverpool Loan Company*, by a memorandum indorsed upon a copy of the mortgage to *Davis*. In March, 1877, the company obtained a stop order, and in March, 1883, the company obtained an assignment by deed from *A. D. Holmes* of his share in the sum of £3302 7*s*. 5*d*.

Davis never obtained a stop order. A summons having been issued for payment out of Court to *Davis* of the sum of £303 13*s.* 7*d.*, it was adjourned into Court, and Vice-Chancellor *Bacon* there held that *Davis* was entitled to the fund, and that it must be paid to him.

The *Liverpool Loan Company* appealed to the Court of Appeal. The appeal was heard on the 17th and 19th of January, 1885.

Horton Smith, Q.C., and *Bardswell*, for the *Liverpool Loan Company*:—

The fund now in dispute having been in Court, the *Liverpool Loan Company* obtained a stop order, but *Davis* never did. By a stop order a second incumbrancer will obtain priority to a fund in Court: *Greening* v. *Beckford* (1). Where more than one incumbrancer have obtained stop orders, they take priority according to the times at which they have been obtained: *Elder* v. *Maclean* (2). It is not denied for the *Liverpool Loan Company* that notice to the trustees of a fund will enure for the benefit of the incumbrancer who gives it, if the fund is afterwards paid into Court: *Matthews* v. *Gabb* (3); and it does not matter that a stop order is obtained by a subsequent incumbrancer: *Brearcliff* v. *Dorrington* (4); *Livesey* v. *Harding* (5). But in the present case the fund was in Court, and as the Court was substituted for the trustees, *Davis* was bound to obtain a stop order, which is equivalent to giving notice to the trustees. It is admitted that the *Liverpool Loan Company* had notice of the charge in favour of *Davis*; but this did not relieve him from the necessity of obtaining a stop order. The present question has not been decided, but on principle the *Liverpool Loan Company* is entitled to succeed.

Warmington, Q.C. (*Oswald*, with him), for *Davis*:—

A stop order does not affect any right: *Coote* on Mortgages (6). This is the first time that an attempt has been made to defeat by a stop order an express notice of a prior incumbrance; a

(1) 5 Sim. 195.
(2) 3 Jur. (N.S.) 283.
(3) 15 Sim. 51.
(4) 4 De G. & Sm. 122.
(5) 23 Beav. 141.
(6) 5th Ed. ch. 66, s. 4, p. 837.

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stop order merely prevents payment out of Court unless notice be first given to the person obtaining it. The *Liverpool Loan Company* had express notice of the mortgage to *Davis* before they took their security; and therefore they cannot obtain priority over him: *Drew* v. *Lockett* (1). It may be that when a fund is in Court, notice of a charge to the trustees will be unavailing against a stop order: *Pinnock* v. *Bailey* (2); and also that when an assignment is made of an interest in a trust fund, part of which is in Court and part in the hands of trustees, the assignee, in order to complete his title, must, as regards the fund in Court, obtain a stop order, and must, as regards the fund in the hands of the trustees, give notice to the trustees: *Mutual Life Assurance Society* v. *Langley* (3); but those decisions do not affect the present case.

Horton Smith, in reply.

Brett, M.R.:—

I think that the decision of the Vice-Chancellor was correct. The share of *A. D. Holmes* was subject to a charge in favour of *A. Davis*, and also to a subsequent charge in favour of the *Liverpool Loan Company*. At the time when each charge was given the fund was in Court. By the practice of the Court of Chancery, when a fund was in Court the Court was considered to be in the position of a trustee, and a stop order had the same effect as the notice of an incumbrance to a trustee. In the present case, no notice was given by *Davis* to the Court, which stood in the place of a trustee; but then the *Liverpool Loan Company* had notice and took their security subject to the charge to *Davis*: that is the true construction of the transaction: the charge to the company is subject to that prior charge. The question before us is whether the *Liverpool Loan Company* can obtain a more effective charge by reason of the stop order. It seems to me that the terms of the charge to them cannot be enlarged, either at law or in equity; and as the company had notice of the incumbrance in favour of *Davis*, they cannot gain priority by obtaining a stop order.

(1) 32 Beav. 499. (2) 23 Ch. D. 497.
(3) 26 Ch. D. 686.

COTTON, L.J.:—

I agree. It is hardly necessary to add anything to what has fallen from the Master of the Rolls, but as the point is of general importance I am unwilling merely to express my assent. A stop order takes the place of notice to a trustee. But in the present case the second assignees took their security with notice of the existing security: therefore, the second incumbrancers stand in the place of the assignor, and it would be wrong to allow the second incumbrancers to obtain a priority over *Davis* after they have taken with notice of the security to him.

LINDLEY, L.J.:—

I am of the same opinion. Our decision must turn upon the effect of the stop order. It is urged that the *Liverpool Loan Company* must succeed because they have obtained a stop order. I think that the stop order goes for nothing in the present case, because when it was obtained the company had notice of the security in favour of *Davis*. The principles governing questions of priority under securities upon chattels personal and *choses in action* are well stated in *Fisher* on Mortgages (1). I think that this appeal must be dismissed with costs.

Solicitors for *Davis*: *G. J. & P. Vanderpump.*

Solicitors for *Liverpool Loan Company*: *W. W. Wynne & Son*, agents for *Brabner & Court, Liverpool.*

(1) 4th Ed. ch. 7, pt. 3, par. 1000.

J. E. H.

C. A.
1885
April 27.

In re WILSON (A LUNATIC).

Remuneration of Solicitor—Sale by Auction—General Order under Solicitors' Remuneration Act, 1881, *r.* 4; *Sched. I., Part I., r.* 11—*Commission to Auctioneer.*

Property of a lunatic in *Lancashire* was put up for sale by auction under an order in lunacy, but was not sold. The solicitor charged £16 12*s.* 6*d.* remuneration according to the scale in the order under the *Solicitors' Remuneration Act*, 1881, on £8300, the amount of the reserved prices. He also paid the auctioneer £5 5*s.*, which was allowed against the estate, and the surveyor's bill of £40 3*s.* was allowed at £31 10*s.* against the estate, but the Taxing Master disallowed the £16 12*s.* 6*d.*, and only allowed £2 2*s.* for instructing the auctioneer and surveyor, and £3 3*s.* for particulars, &c. His reasons were, first, that the solicitor had not in fact conducted the sale, the auctioneer and surveyor having done most of the work, and been paid by the client; and, secondly, that the scale did not apply, for that a commission had been paid to the auctioneer by the client within the meaning of rule 11 to Part I. of Schedule I. to the General Order:—

Held, by the Court of Appeal, that as the bill of the surveyor contained charges for various things which it was the duty of the person conducting the sale to do, the solicitor had not done the whole of the work for which the *ad valorem* remuneration was provided, and the scale did not apply:—

Semble, also, that the case was taken out of rule 4 by the specific provision of rule 11 to Part I. of Schedule I. to the Order, which provides that the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer.

ON the 7th of April, 1884, an order was made for taxation of the costs of the petitioner and the next of kin of certain proceedings in the lunacy, including an attempted sale by auction of certain real estate of the lunatic in *Lancashire*.

Among the items in the bill of costs was the following:—

"Charges for conducting sale to public auction of *Arkwood House* and grounds, being lot 1, and land opposite, on the north side of the old *Chester Road*, being lot 2, and preparing conditions of sale, &c., when property not sold. Reserve price for both lots being £8300 . . . . . £16 12*s.* 6*d.*"

The auctioneer was paid a fee of £5 5*s.* for his services, which

was allowed against the estate. A surveyor was employed who sent in a bill as follows:—

1884.		£	s.	d.
April 26.	Survey of the property and comparing plan attached to the deeds with existing boundaries	3	3	0
May 1.	Re-survey of property, indicating boundaries of land belonging to Mr. *Wignall* and to *Dodd's* trustees. Two clerks engaged two days	4	4	0
	Preparing large plan of property and plotting same to scale of 133 feet to one inch, calculating contents of land, and dividing same into four lots for purposes of sale	2	2	0
	Preparation of two fair copies of same .	1	11	6
„ 9.	Conference with Mr. *Tyrer* at *Arkwood* in reference to a suggested scheme of re-lotting land N. side *Old Chester Road* and abutting *Bromboro' Pool*.	2	2	0
„ 16.	Survey of *Arkwood House* and grounds, taking measured details of buildings for particulars of sale	1	1	0
„ 22.	Clerk attending at *Bebington* and tracing tithe award dated the 26th of August, 1847, of property, in reference to identification of area of certain lots affected by tithe, and paid rectorial fees . . .	1	6	0
	To valuations in detail of the entire property as under:—			
	Lot 1. Valuation £8000. .	9	9	0
	„ 2. „ £2549. .	4	4	0
	„ 3. „ £850. .	2	2	0
	„ 4. „ £2850. .	4	4	0
		19	19	0
June 9.	Preparation of plan in detail of *Arkwood* estate for lithography	1	11	6

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		£	s.	d.
June 9.	Perusal of affidavit regarding areas and values of land to be sold to Mr. *Wignall* and sworn to same	0	10	6
„ 17.	Assistants at *Arkwood* measuring off the several boundaries to Lot No. 1, and checking area of land purchased by Mr. *Wignall* and expenses. Engaged one day and a half	2	2	0
	To fair copy plan of land purchased by Mr. *Wignall* (for deed)	0	10	6
		£40	3	0

The Taxing Master allowed this bill against the estate at £31 10*s.*

The Taxing Master disallowed the £16 12*s.* 6*d.*, and only allowed the solicitor £2 2*s.* for instructing the auctioneer and surveyor, and £3 3*s.* for the particulars, &c. The petitioner carried in objections to this taxation claiming this sum as the proper amount allowed by Schedule I. Part I. to the rules under the *Solicitors' Remuneration Act*, 1881.

The Taxing Master replied: "The 'conducting' scale charge is only applicable when the solicitor 'conducts' the sale. In this case an auctioneer is employed and paid by the client, also a surveyor to set out the lots, value them, and generally advise as to value. The auctioneer is paid £5 5*s.*, the surveyor £31 10*s.*, both by the client. I have allowed the solicitor a fee of £2 2*s.* for instructing the surveyor and auctioneer, also a fee of £3 3*s.* in respect of the particulars, &c."

Among the reasons annexed to the objections was this: that no commission had been paid by the client to an auctioneer, for that "commission" in the rules applied only to a percentage. The Taxing Master replied: "If this contention is to prevail the solicitor has only to fix a 'fee,' whether large or small, and then say no commission was paid, and have a conducting fee. It is a common case with solicitors to charge the conducting fee according to the scale, and pay a small fee to an auctioneer; but then the auctioneer's fee must be paid by the solicitor, not the

client, who in this case pays an auctioneer and surveyor also." Further on he said: "I have never known a case in which the solicitor has been allowed the conducting fee when the client paid the auctioneer as in this case." The objections further alleged, "the fact of an auctioneer being employed, according to the *Lancashire* custom, does not in the least affect or reduce the amount of the solicitors' work. The *Lancashire* solicitors do all the work which in other parts of the country is done by the auctioneer, and for which he gets a commission, other than the actual offering for sale in the room." The Taxing Master replied: "I entirely disagree. The conducting fee is payable where the solicitor really does the work. In this case the work is done by the surveyor and auctioneer, and any extra work done by the solicitor I have allowed for in the fees of £2 2*s.* and £3 3*s.* above referred to."

A summons to review the taxation was adjourned into Court.

Neville, for the summons:—

Rule 4 says that the solicitor is to have a percentage, and that auctioneer's charges are not to be included. The Taxing Master considered that rule 11 of the rules to Part I. of the 1st Schedule governed the case; but that rule only applies to a case where commission is paid by the client to the auctioneer, and here there was not a commission, but only a small fixed charge for the actual conducting the sale in the auction room. If rule 4 does not apply to a small fixed charge like that, to what does it apply? In other parts of the country auctioneers do much more of the business connected with a sale by auction, and receive a commission on the purchase-money. In *Lancashire* the solicitor does much more, and the auctioneer only receives a small payment; not depending on the amount of the purchase-money—such a payment is not a commission. In *In re Beck* (1) a commission of ¼ per cent. was allowed to the auctioneer, and yet the solicitor was allowed remuneration according to the scale.

[COTTON, L.J.:—We will speak to the Taxing Master before disposing of the case, as there is no one to argue against you.]

(1) 24 Ch. D. 608.

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COTTON, L.J.:—

We think that the Taxing Master has come to a right conclusion. The question depends on the *Solicitors' Remuneration Act* and the rules made under it. By Schedule I. Part I. to the rules it is provided that the remuneration to the vendor's solicitor "for conducting a sale of property by public auction including the conditions of sale . . . . when the property is not sold" shall be of the amount therein mentioned, being an *ad valorem* commission on the reserved price according to a scale. In this case the solicitor charged £16 12*s.* 6*d.*, being the amount allowed by the scale on £8300, the amount of the reserved prices, and he also carried in a bill for surveyor's charges amounting to £40 3*s.* (allowed by the Taxing Master against the estate at £31 10*s.*) and charged against the estate £5 5*s.* paid to the auctioneer, which was allowed. We have no account of what was done by the auctioneer, but from the surveyor's bill it appears that many things were done by him which ought to be done by the persons conducting the sale, things which, when the auctioneer conducts the sale, are done by him. Here the opinion of the Taxing Master was that the solicitor did not really conduct the sale. The property may have been in such a state that the solicitor could not alone do all things that were necessary for the sale, but in such a case, if he claims the *ad valorem* remuneration, he must get them done by a person paid by himself. As these things have been done at the expense of the estate I am of opinion that the solicitor cannot claim remuneration according to the scale. The Act and rules were not intended to give the solicitor remuneration according to the scale where he does not do the whole of the work for which the remuneration is provided, but somebody else does and is paid by the client for part of that work.

The Taxing Master gives as one of the reasons for his conclusion that the *ad valorem* payment can never be allowed to the solicitor when the client pays the surveyor and auctioneer. It is hardly right to give an opinion on that point, as we decide the case on another ground, and I do not mean to give a concluded opinion on it till some case comes on where it is necessary to decide it. Rule 4 would give the percentage to the solicitor

though there was a payment to the auctioneer, but the 11th of the rules to Part I. of Schedule I. specifically applies to a sale by auction, and I am disposed to think the Taxing Master right in his view that the case is governed by the latter rule.

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LINDLEY, L.J.:—

I am of the same opinion. There is a difficulty in construing rule 4, which is general, along with the 11th of the rules of Schedule I., Part I., which is specific; but I understand the practice to have been to treat the latter rule as controlling the general one, and I am disposed to think this practice right.

FRY, L.J.:—

I agree.

Solicitors: *Burton, Yeates, & Co.*, agents for *Tyrer & Co., Liverpool.*

H. C. J.

In re CAPE BRETON COMPANY.

C. A. 1885 *March* 28, 30; *May* 4.

Principal and Agent—Agent for purchase—Sale of Agent's own Property to Principal—Non-disclosure—Account of Profit made by Agent—Director—Misfeasance.

In 1871 certain coal areas were purchased for £5500 by six persons, of whom *F.* was one, and were vested in *G.* as a trustee for them without disclosing the trust. In 1873 a company was formed for the purpose of purchasing these areas and other property. *F.* was one of the directors, and as such he concurred in effecting a purchase by the company from *G.* for £12,000 cash, and £30,000 in fully paid-up shares, without disclosing the fact that *F.* was a part owner. In 1875 the company was ordered to be wound up. In 1878 a meeting of contributories was called, at which two rival schemes were brought forward, one for repudiating the purchase of the coal areas, the other for adopting the purchase and selling the property. The latter scheme was adopted, and was confirmed by the Court. The liquidator accordingly sold the property, but at a heavy loss. A contributory then took out a summons under sect. 165 of the *Companies Act*, 1862, to make *F.* liable for misfeasance as a director in allowing the company's seal to be affixed to the agreement for purchase by the company. Mr. Justice *Pearson* dismissed the summons, holding that though the company would have been entitled to rescind the contract, yet as rescission had become impossible no relief could be given against *F.*; that as *F.* when he acquired his

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interest in the property was not a trustee for the company, he could not be treated as having purchased on behalf of the company at the price he gave, and therefore was not chargeable with the difference between the price at which he bought and the price paid by the company, and that he could not be charged with the difference between the price paid by the company and the value of the property when the company bought it, as this would be making a new contract between the parties.

Held, by *Cotton* and *Fry*, L.JJ., *dissentiente Bowen*, L.J., that this decision was right.

THIS was an appeal from a decision of Mr. Justice *Pearson* (1).

In April, 1871, six persons, of whom *Fenn* was one, purchased three coal areas in *Nova Scotia* for £5500, and the legal estate was vested in *Gisborne*, the trust not being disclosed. In November, 1873, the *Cape Breton Company* was formed for the purpose of acquiring the property of three previously existing companies, and also the coal areas in question. *Fenn* was one of the first directors of this company. In December, 1873, *Gisborne* agreed to sell these coal areas to the company for £42,000, to be paid £12,000 in cash and £30,000 in fully paid-up £10 shares. *Fenn* was present at the meeting of the directors at which the seal of the company was affixed to the agreement, but did not disclose the fact, nor did his co-directors know, that he was a part owner of the property. The sale was completed, and *Fenn* received for himself and his partner, who was another of the six owners, £4525 in cash, and 810 shares. In 1875 an order was made to wind up the company, and in 1880 these coal areas along with the other property of the company were sold by the liquidator for £14,500, the three areas selling for much less than the company had given. This sale took place under a scheme of arrangement passed by the shareholders under the *Joint Stock Companies Arrangement Act*, 1870, and sanctioned by the Court, and at the time when the scheme was passed the shareholders knew of *Fenn's* interest in the property, and a proposal to repudiate the purchase was negatived. After this, the Appellant, who was one of the contributories, took out a summons to make *Fenn* liable for misfeasance as a director in allowing the seal of the company to be affixed to the agreement of December, 1873. Mr. Justice *Pearson* held that as rescission of the contract had become impossible no

(1) 26 Ch. D. 221.

relief could be had as against *Fenn*. From this decision the present appeal was brought, and was argued on the 28th and 30th of March, 1885.

Cookson, Q.C., and *Northmore Lawrence*, for the Appellant:—

(1.) The burden of proof lies on the directors to shew that in selling to the company they made a full disclosure of their interest in the property, and did not take advantage of their fiduciary position: *Dunne* v. *English* (1); *Erlanger* v. *New Sombrero Phosphate Company* (2). (2.) The company has sustained damage. We have got a property which was originally bought for much less than we gave for it, and sold again for much less than we gave for it. In the absence of evidence of its having had a higher value in the interval it must then be presumed that we gave for it much more than it was worth, and we are entitled to the difference of price: *Tyrrell* v. *Bank of London* (3). (3.) The right to damages is not gone because we affirm the illegal transaction: *Houldsworth* v. *City of Glasgow Bank* (4); *Clarke* v. *Dickson* (5). The principle is laid down in *Erlanger* v. *New Sombrero Phosphate Company* (6).

[FRY, L.J.:—Does the principle apply where there is not a case of misrepresentation?

COTTON, L.J.:—How do you shew that loss was occasioned by misrepresentation?]

There is a virtual misrepresentation; the agent throws me off my guard, as I suppose he is acting on my behalf without any conflicting interest, and I therefore do not employ an independent valuer.

[FRY, L.J.:—Is there not a difference between a common law action for misrepresentation, and a proceeding relating to trust property where there was no false statement made?]

There has been a grave breach of duty resulting in heavy loss, and is it possible that there can be no remedy? We contend that the principal on discovering the fraud may either rescind the

(1) Law Rep. 18 Eq. 524.
(2) 3 App. Cas. 1218, 1229, 1277.
(3) 10 H. L. C. 26.
(4) 5 App. Cas. 317, 323.
(5) E. B. & E. 148.
(6) 3 App. Cas. 1218, 1278.

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contract or retain the property and sue for damages. Supposing that the *Statute of Limitations* would run from the time of the discovery of the fraud, *Metropolitan Bank* v. *Heiron* (1), on the ground that this was not trust money in the agent's hands, it is not made out that the Appellant knew of the fraud till within six years before he took out his summons.

[Cotton, L.J.:—If the company knew of it, surely an individual shareholder cannot bring an action when they are barred?]

It is not shewn that the company did know of it till within six years, and the inference is that they did not. But we contend that *Metropolitan Bank* v. *Heiron* does not apply, for here the directors misapplied money of the company in an improper purchase, and the *Statute of Limitations* is no defence: *Erlanger* v. *New Sombrero Phosphate Company* (2); *Flitcroft's Case* (3).

[Fry, L.J.:—Is there any case in favour of the contention that the agent can be made to pay the difference of price?]

There is no decision in point one way or the other, but the observations of *James*, L.J., in *In re Ambrose Lake Tin and Copper Mining Company* (4), and of *Knight Bruce*, L.J., in *Benson* v. *Heathorn* (5), and of Lord *Romilly* in *Bentley* v. *Craven* (6), are in our favour.

[Fry, L.J.:—How do you make out a contract to sell at a fair price?]

Where a wrong is done the Court will be astute to find a remedy, and sect. 165 is not to be construed narrowly, it was intended to provide a summary remedy in all cases where an action would otherwise have been necessary: *Stringer's Case* (7); *Coventry and Dixon's Case* (8); *In re National Funds Assurance Company* (9); *Ex parte Pelly* (10).

Davey, Q.C., and *Farwell*, for *Fenn*, were desired to address themselves to the point whether the company could claim from *Fenn* the profit he made on the transaction.

(1) 5 Ex. D. 319.
(2) 3 App. Cas. 1218, 1277.
(3) 21 Ch. D. 519.
(4) 14 Ch. D. 390, 394.
(5) 1 Y. & C. Ch. 326.
(6) 18 Beav. 75.
(7) Law Rep. 4 Ch. 475, 493, 494.
(8) 14 Ch. D. 660, 673.
(9) 10 Ch. D. 118.
(10) 21 Ch. D. 492, 504.

The difference between the price paid by *Fenn* and the price paid by the company is no measure at all of the profit.

[COTTON, L.J.:—It is urged that you ought to repay the difference between what you received and the fair price.]

What obligation can a trustee be under to have the price fixed for him by a Judge in Chambers. His answer is, "*Non hæc in fœdera veni.* I think the property worth at the time what you gave: if you don't like the bargain rescind it, but you cannot make another bargain for me." There is neither authority nor principle in favour of thus making a new contract between the parties.

[BOWEN, L.J.:—Suppose the company had not discovered the facts till after the property had been sold, so that they never would have had an opportunity of rescinding, would they be without any remedy?]

We submit that they would, but the question does not arise here as there was ample opportunity for rescinding. If the company, knowing the facts, elects to retain the property, that removes all objection to the contract—the contract is affirmed, and whatever profit was made is lawfully made, the company having affirmed the transaction. Lord *Cairns* in *Erlanger* v. *New Sombrero Phosphate Company* (1) lays down the law in our favour, and holds that the company cannot get profits unless at the time of the purchase it had a right to the property at a lower price. The only evidence of over value is that we bought for a less price some years before, and nothing is shewn as to circumstances which may have affected the value in the interim. The case of the Appellant is founded on fraud, and fraud is never presumed. He must prove that the company gave too much according to the value at the time.

F. C. Norton, for the liquidator.

May 4. COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Pearson* refusing an application under the 165th section of the *Companies*

(1) 3 App. Cas. 1218, 1235.

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Act, 1862, to make Mr. *Fenn*, one of the directors of the company, answerable for the whole of the prices which were paid for certain properties purchased by the company. I need not go into the terms of sect. 165, for the effect of that section was settled long ago. Mr. *Cookson*, if I rightly understood him, put his case under that section too high, as if it gave him some new right. His junior took what I think is the correct view, that it only gives a summary method of enforcing rights which exist independently of that section, but does not create any new right.

This company was formed for a particular purpose stated in the memorandum of association. Its object was to acquire the undertakings of three companies which had property in *Nova Scotia*, and also to acquire certain coal areas, the *Haven*, *Lake*, and *Balmoral* areas, as to which the present question arises. These last-mentioned properties were at that time, and had been for some considerable time previously, the property of various persons, of whom the director Mr. *Fenn* was one, and so far as there could be any legal estate in what I believe was merely a liberty to work these coal areas, it had become vested in a person named *Gisborne*, as trustee for *Fenn* and others. The 2nd clause of the articles refers particularly to an amalgamation agreement of the 24th of October, 1873, which was made with a Mr. *Blunt*, acting for and on behalf of the promoters of the intended company, to be called the *Cape Breton Company, Limited*, relating to the purchase by such intended company of the properties of the companies parties thereto of the first three parts. Then article 5 provides that "The company acting by the directors shall adopt and carry out the amalgamation agreement so as to entitle the company to the rights and subject the company to the obligations thereby expressed to be conferred and imposed upon the *Cape Breton Company, Limited*." Then, I think, the only other clause which need be referred to in the articles is 109, which states the powers of the directors, and says, among other things, "They may purchase and acquire for the company the *Haven*, *Lake*, and *Balmoral* coal areas mentioned in the memorandum of association at a price not greater than £30,000 in fully paid-up ordinary shares and £12,000 in cash." It does not say that they are to buy at that sum, but it expressly authorizes them to buy those particular

properties at a sum not exceeding that at which they in fact have bought them. Mr. *Fenn* was on the board and he concurred, and I will assume that, without stating what the nature of his interest was in these properties, he took part in the resolution of the board to buy them at that sum, which was to be the extreme limit. At the time when Mr. *Fenn* acquired an interest in these properties he was not in any way acting as a director of the *Cape Breton Company*, and that company was not formed until long after he had acquired his interest. Nor was it suggested that he was in such a position that he could when the company was formed be considered as being a trustee of these properties for the company which was in course of formation. In the year 1875 an order was made to wind up the company, and in May, 1878, an arrangement was made with the sanction of the Court for the sale, along with other property, of the three coal areas in question, and that I think is very material. I will assume that up to that time the state of the title and the interest which Mr. *Fenn* had in this property at the time of its purchase was unknown, and that the purchase was made under the belief that *Gisborne* was an independent party and not a trustee in any way for Mr. *Fenn*. But when the meeting was held in May, 1878, at which the resolutions were passed for sale of the company's property, two rival schemes were brought forward. The one proposed that the sale of the three coal areas to the company should be repudiated, the other proposed that the sale and purchase should be adopted, and that the property should be sold to the best advantage. That latter scheme was adopted, and the resolutions were sanctioned by Vice-Chancellor *Malins*. It can hardly be contended that, when these rival schemes were discussed, the meeting had not full knowledge of the circumstances under which Mr. *Fenn* had taken part in the purchase of these properties by the company, and with that knowledge the meeting deliberately determined to adopt the purchase, and see what they could make by a sale of the properties.

I may pause here for one moment. It was said that even if that would prevent the liquidator from obtaining the relief which is here sought by the Appellant, that a shareholder stands in a different position, and is not bound by the acts of the liquidator.

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In my opinion, that is wholly unfounded. The liquidator sold as and for the company, and under a resolution passed at a meeting of shareholders duly convened for the purpose of ascertaining what was the will of the shareholders, and, in my opinion, it is not possible for an individual shareholder, whether he was present or not, or assented or not, to contend, after that resolution, and after it has been acted on by a sale by the liquidator, that he is entitled to say: "I am not in any way affected by the acts of the liquidator in adopting the purchase and selling the property for what it was worth." The property unfortunately sold for very much less than had been given for it by the company. On the 6th of December, 1882, this summons was taken out in order to recover from Mr. *Fenn* either the whole amount which had been given by the company for the property, or to recover the profit which it was said he had made by the transaction.

In the first place, the application was treated by the Appellant as an action for damages, because that was the only way in which the whole amount of purchase-money could be recovered. It was not contended that there had been any misrepresentation made by Mr. *Fenn*, so we need not consider that point. It may be that some other individual shareholder might have ground for saying that he had been induced by misrepresentation to take shares, but we have not to deal with that case: the case we have to deal with is an entirely different one. This is the case of a shareholder who says he represents the company, and in fact is bringing an action for damages on behalf of the company. It is urged by the Appellant that the directors had been authorized to buy, and had not duly performed the duty which had been committed to them, and that therefore, as an action could be brought against an ordinary agent for not performing the commission entrusted to him, so in like manner an action could be brought against the directors. It is material on that part of the case to consider what I have already mentioned,—that the company was expressly formed for the purpose (among other things) of acquiring this particular property. The directors, therefore, were not acting under a general authority to buy property. If they had been, it might be said that when an agent does not buy, but hands over to his principal property of his own, he has not performed the

commission entrusted to him. No authority has been quoted to shew that even in that case a director would be liable to an action by any shareholder for not having performed the duty which was entrusted to him by the company, and in my opinion such an action could not be maintained. There could be no action at law, and it cannot be considered that a contributory can acquire a right to bring in substance such an action, by taking out a summons under sect. 165. Subject to what we might hear in argument, for we have not heard the Respondents on this point, and assuming that the whole circumstances were not in fact known to the board and to the company at the time of the purchase, the company, if so minded, might have set aside this purchase altogether. Where a trustee, purchasing on behalf of his *cestui que trust*, purchases his own estate without disclosing his own interest in it, the *cestui que trust*, when he discovers the fact, may, if he pleases, set aside the contract altogether, but then he must return that which has been purchased. The same rule applies, in the case of a purchase by a director on behalf of a company, of property in which he has any interest: if the company repudiates the contract, the property must be returned. In this case a return of the property is impossible after what was done in 1878. The resolution of the shareholders to sell the property was passed in 1878, and the company having determined to adopt, and not to set aside, this contract of purchase, it is too late now to seek to do so.

Then it was said that if there can be no action for damages yet that this shareholder, on behalf of the company, is entitled to get the difference between what was paid by Mr. *Fenn* for his share of the property and his share of the purchase-money which he got. No authority has been cited for that proposition. Numerous cases have been brought before the Court, but none of them are like the present, because, in all the cases where relief was given, the case was that of a trustee or a director who had sold to his *cestuis que trust*, the company, at an enhanced price, property which he had acquired when he was a trustee or director, and he was held to be liable for the difference on the ground that at the time he acquired his interest in the property he was in the position of a trustee. The principle of those cases is very clear. It

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is this, that having bought the property while he was a director, and so in the position of a trustee for the company, and having afterwards made it over to the company without disclosing his interest, he was estopped from saying that he originally bought the property on his own behalf, or otherwise than for and on behalf of the company. When, therefore, he pays a large additional sum of money out of the coffers of the company for the property, he is putting into his own pocket a sum of money by way of purchase-money paid by the company for that which was already their own. The cases which have been decided only come to that. Take the case of *Tyrrell* v. *Bank of London* (1). That was a case where a person who was the solicitor of the company acquired an interest in a certain property, and, as appeared on the evidence, not only in the expectation, but with the intention, that the company should be induced by him and others to buy the property, he knowing that it was what they wanted and what was necessary for the purposes of their business. As the solicitor of the company he must be considered as having acquired an interest for and on behalf of the company, and could not retain any profit which he acquired by the company following out what he suggested, and acquiring the property which he had bought with the view of making it over to them or persuading them to buy it. In the case of *Erlanger* v. *New Sombrero Phosphate Company* (2), where the purchase was set aside, Vice-Chancellor *Malins* discussed the question which we are now considering, and Lord *Cairns* certainly expressed an opinion adverse to the view that under circumstances like the present there could be any claim against the trustees. He says (3): "The part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit which they made on the resale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the Judges in the Courts below." That is to say, if it had been made out as a fact that at the time *Erlanger & Co.*

(1) 10 H. L. C. 26.

(2) 3 App. Cas. 1218; 5 Ch. D. 73.

(3) 3 App. Cas. 1235.

bought they were buying as trustees for the company, then, of course, the difference on the sale to the company would be something paid by the company for nothing, but Lord *Cairns* said that this case could not be sustained, because, in fact, *Erlanger & Co.* were not when they bought in the position of trustees for the company. How, then, can Mr. *Fenn* be made answerable for what is called the profit, if at the time when he acquired the property he was not trustee for the company, or in any fiduciary position towards the company. In my opinion, if we had to decide the question without any assistance from the opinion of Lord *Cairns*, we ought still to say that Mr. Justice *Pearson* was right. What is really profit made by a trustee? It is the difference between the value of the property at the time of the purchase being made by the company, and the price which the company gave. It is not the difference between the price that the trustee gave when he was in no way a trustee for the company and that which he got from the company. We have not to decide that in no case could a trustee under such circumstances be made answerable for the difference between the price paid by the company and the market value of an article which had some definite market value, and I will not say what I should decide in such a case. Here the property is one for which there is no market price. The only mode of ascertaining what is the value of such a property is to find how much a purchaser will give for it. If we were now to enter into the question what was the value, we should have to do so with the knowledge which has subsequently been acquired of this property, and should be making an entirely new bargain between the vendors and the company. The company have, with the knowledge of the facts, determined to hold the property which they only acquired by agreeing to pay a certain price, and although they may have been entitled to set that agreement aside, yet I think that as they, with knowledge of all the facts, elected to retain the property, it would be wrong to require the trustee to hand over to them that money which was the only consideration upon which he agreed to give the property.

Now undoubtedly there are cases in which there are expressions used by Judges to this effect—that a trustee will never be allowed to retain a profit made on any transaction when he was a trustee.

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Lord Justice *James* in *In re Ambrose Lake Tin and Copper Mining Company* (1), said that if the property could not be given back, and if therefore the contract could not be rescinded, the Court would somehow or other make the trustee responsible, but he did not explain how or in what way. I adhere to what I said in that case. Another case containing expressions favourable to the Appellant's case is *Benson* v. *Heathorn* (2). But in that case the defendant was an agent for a company engaged in the business of buying and hiring ships, and while in that position he bought a ship which he afterwards sold to the company at an increased price. Of course that came within the obvious principle that he was getting that increased price out of the company for nothing at all. The property was already theirs, because when he made it over to the company without disclosing his ownership, he was to be held to have purchased as their agent. The case of *Bentley* v. *Craven* (3) has perhaps more expressions in it than any other supporting the Appellant's view, but what did that case turn upon? There was a partnership for refining sugar. One member of the firm, who also himself carried on business independently as a sugar dealer, was employed on behalf of the partnership to purchase sugar for them. He bought sugar and then wished to hand it over to the partnership at an increased price. That, upon the principle I have already referred to, could not possibly stand. If he wished these sugars to be treated as the sugars of the partnership, he must be treated as having bought them as the agent of and on behalf of the partnership. As far as I can find, and I have looked very carefully, there is no decision which in any way favours the view of the Appellant. His counsel have been unable to refer to any decided case in which where an agent has bought his own property on behalf of his principal, that principal has been allowed to retain the property and charge the agent with the difference between the price the agent gave for it, and the price at which he sold it to his principal. This appeal therefore fails.

BOWEN, L.J.:—

In this case I feel hesitation in differing from my learned Brethren, whose knowledge of the doctrines of Courts of Equity

(1) 14 Ch. D. 390, 394. (2) 1 Y. & C. Ch. 326. (3) 18 Beav. 75.

is so much greater than mine, but as I cannot understand the principle upon which relief has been refused in the Court below, it becomes necessary for me to state my views. I fully feel the force of the observation of Mr. *Davey*, that there is no precedent or authority for granting the relief asked for in this case, and I fully feel the burthen that one has to bear in not being satisfied with that kind of negative argument. But here is a case in which it is conceded for the purposes of the present argument that a trustee has acted improperly, and has gained a benefit at the expense of his *cestuis que trust*, and it seems to me a serious matter if a Court of Equity can afford no relief under such circumstances.

Mr. Justice *Pearson* has held that if the case put forward by the applicant was well founded, the only relief which could be afforded him would be to rescind the contract, and that as rescinding the contract has become impossible, the company could have no remedy against Mr. *Fenn*. In the few remarks I am going to make, it must be understood that I do not assume the case which has been opened against Mr. *Fenn* to have been proved. Mr. *Fenn* has not been heard upon the facts; the case having assumed the shape of a nonsuit on a point of law, with which we are all familiar on the Common Law side. Mr. Justice *Pearson*, without calling on the Defendants, decided that even if the case put forward by the Appellant was unshaken, there would nevertheless be no ground for the exercise of the power conferred upon this Court under sect. 165. It is upon this point of law alone that I express any doubt. Mr. *Fenn* may have a most complete answer upon the merits, but if he has no case upon the merits, I do not see why the Appellant is not entitled to the protection of the Court.

The *primâ facie* case against Mr. *Fenn* is this, that he was a promoter and certainly a director of the *Cape Breton Company*, and that he as director was entrusted with a duty of purchasing property on behalf of the company on the best terms he could. A maximum price was fixed beyond which the directors were not to go, but within that limit they had to secure the property on the best terms they could. The evidence of the Appellants, if not contradicted, shews that Mr. *Fenn*, at the very time when he

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effected the purchase on behalf of the company, was interested in the property purchased, that he did not disclose his interest to the company, and that, unknown to the company, he made a profit out of the transaction. The company have not chosen to try to rescind the contract of sale, but after the discovery of the fraud, if fraud there were, the liquidator resold the property to a third person, and it is contended by the Respondents that this disentitles the Appellant to ask for any relief against Mr. *Fenn*.

Now it seems to me, upon every principle of justice and equity, to be clear, that in all cases where a person is directly or constructively an agent or trustee for other persons, all profits made by him on behalf of the business in which he is so employed, without the knowledge of his *cestuis que trust*, belong in equity to his employers and not to himself. If this was a clandestine profit he must hand it over. It is contended on behalf of the Respondents that where an agent or trustee is a vendor or co-vendor of the property out of the sale of which he is making this surreptitious profit, the remedy of the principal or the *cestuis que trust* upon discovery of the fraud is to rescind the contract, but that if the principals do not choose to insist upon the rescission they are not entitled to any further relief. It has also further been contended on behalf of the Respondents, (and this is a separate point,) that if the property dealt with is not property which has a market value, so that there are no means of determining with certainty what profits have been made, then equity pauses in its pursuit of the fraudulent trustee, though on what ground it so pauses I confess I do not see. I am perfectly aware that it would be invidious for me to pretend to be wiser than the great masters of the science of equity into whose mysteries I have only recently been initiated, and I do not claim to be so, but the right of the principal or the *cestui que trust* to claim a profit made by an agent or trustee, seems to me to be wholly independent of the right to rescind the contract. The principal's right to recover secret profit is in fact chiefly valuable in a case where the contract cannot be rescinded. An obvious analogy exists in a class of cases well known to the law, where a vendor has been guilty of fraud. The purchaser may, if he chooses, confirm the contract, and nevertheless sue the vendor for fraud. Applying the same sort of reasoning to the

present case, I cannot see why the right of the *cestui que trust* or the principal to claim the profit fraudulently made by the agent or trustee, should be lost simply because he elects to keep the subject-matter or is unable to determine the contract. It is said that by electing to keep the article sold, and at the same time insisting upon a return of the profits made, the purchaser would be altering the contract, and would be endeavouring to keep the property sold to him at another and a different price. This objection, if it were sound, ought in common law cases, of which this is not one, to prevent a person who has bought a horse on a fraudulent warranty, from bringing an action for fraud if he keeps the horse. With very great respect for the judgments of those who think otherwise, it seems to me to involve a fallacy. The *cestui que trust* who seeks to keep the thing purchased, and nevertheless demands the profit improperly made, does not claim to be recouped part of the price as price, nor attempt in any way to vary the contract. The fraudulent agent or trustee who made the contract knew from the very first, or ought to have known, that it was an incident of equity and fair play attaching to such a contract, that an agent or trustee was liable upon demand to hand back any profit clandestinely made by him. Making a vendor return something which he ought not to have, is not altering the contract, it is only insisting upon an incident which equity attaches to it. A contract is not set aside merely because an incident which is attached to it by equity is enforced, and in the same way it seems to me that it cannot be said that, by affirming a contract, the person who affirms it releases any right which is not inconsistent with the contract itself.

Then it was urged that the profit made in this case was not a liquidated sum, nor capable of being defined upon the materials before us. I agree that in the present case the measure of damage ought not to be the difference between the price at which the property was bought by the director, and the sum at which it was sold by him to the company; for at the time when the property was bought, the person who bought it was in no sense a trustee for the company. But it does not seem to me to follow, that because the profit is not a liquidated sum it is to be considered to be

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incapable of being ascertained, and therefore cannot be recovered from the fraudulent trustee. Possibly a considerable amount of evidence would be required, but the difficulty of ascertaining the amount of relief appears to me no reason for refusing relief. Suppose the transactions had related to shares which had a market value, the measure of profit would be the difference between the market value of the shares at the time they were sold by the agent to his company, and the price at which they were sold. But is relief to be given in the case of shares, and to be refused in the case of articles which have not a market value? Is a trustee to be at liberty to pocket the illegitimate profit which he makes upon a picture or a gem, when he may not do so in the case of shares? It seems to me that the only difficulty in dealing with such a case is the difficulty of assessment, and that is a difficulty which is dealt with every day in every branch of the High Court. We are all familiar with the difficulty which arises where there is no exact measure of damages, and there is no more impossibility, as it seems to me, in the present case, of arriving at a fair estimate of the real value of the property at the time of the sale to the company, than in any other case where you have to determine the value of property by the evidence of experts.

Upon those grounds, though fully aware how absurd it appears for me to pretend to be wiser than such great equity lawyers as my learned Brothers, I cannot help saying that I am unable to follow the decision of Mr. Justice *Pearson*.

Then as to the question upon the *Statute of Limitations*. I do not think it is satisfactory, when there has been a nonsuit on one point of law in the Court below, to nonsuit in the Court of Appeal on another point which was not argued below. It may be true that the burthen of taking the case out of the *Statute of Limitations* rests on the Appellant, but, if that point had been threshed out before Mr. Justice *Pearson*, he might possibly have allowed further evidence to be called. If our judgment on this appeal were in the Appellant's favour, I think that the Respondents would still be at liberty to take the objection of the *Statute of Limitations* in the Court below.

FRY, L.J.:—

The facts of the present case appear to me to amount shortly to these:—that Mr. *Fenn* was the agent of the company to purchase a specific property in which, before the commencement of his agency, he had acquired an interest, that Mr. *Fenn* did purchase it for the company without disclosing to the company his interest in the property, and that after the purchase the facts were fully disclosed to the company, and, with the knowledge so acquired, the company elected to retain the property. Upon that state of facts arises the question, whether Mr. *Fenn* was liable to the company for any sum, by reason of fraud or breach of trust or duty.

Now, let me in the first place say what this case is not. This case is not the case of an agent who, after he has accepted the agency, has acquired property, the purchase of which was within the scope of his agency, and then has resold that property to his principal at a larger sum, in which case it is obvious that the principal may say that the original purchase by the agent at a smaller price was a purchase on behalf of the principal. Nor is this the case of a man who accepts an agency to buy some article in the market, and then sells to his principal his own goods, in which case it may be that the agent is liable for not performing his agency by purchasing in the market, supposing it was possible for him so to do. This case is distinguished from that, by there being a direction to buy a specific property. Nor, again, is this the case of an agent who, by any subsequent acts of his own, has rendered the rescission of the contract by his principal impossible. I express no opinion whether or no, in that case, the principal would have a right against the agent, notwithstanding the non-rescission of the contract. This is a case in which the agent, before accepting the agency, had an interest in the property, and during the agency sold that property to his principal without disclosing his interest. That in such a case the principal would have a right to rescind there can be no doubt. The option which the principal had, has in this case been exercised by confirming the contract with knowledge of the facts, and the question is whether, after that affirmance, the agent is liable in any sum to his principal. There is no authority which determines this point, and it, therefore, is to be determined upon principle.

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Now, notwithstanding the very powerful criticisms of Lord Justice *Bowen* on the judgment of Mr. Justice *Pearson*, I think that judgment right. I think that the case is one in which the adoption of the contract by the principal puts an end, and ought to put an end, to any further rights against the agent. It appears to me that to allow the principal to affirm the contract, and after the affirmance to claim, not only to retain the property, but to get the difference between the price at which it was bought and some other price, is, however you may state it, and however you may turn the proposition about, to enable the principal, against the will of his agent, to enter into a new contract with the agent, a thing which is plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which, I confess, I do not understand.

It is said that, notwithstanding the ratification of the contract, the principal may claim some profits from the agent because those profits were made surreptitiously or clandestinely. It appears to me that the answer to that is this, that whatever the profits are, and however they are to be measured, those profits result, not from the original contract, but from the affirmance of the contract by the principal, and that, therefore, the profits which are made by the agent are neither clandestine nor surreptitious. I can conceive two possible claims being made. The one would be on the view that the profits were the difference between the purchasing and the selling price in the hands of the agent, but, as has already been observed by Lord Justice *Bowen*, that cannot possibly be the measure of the claim of the principal, because at the date when the agent purchased he was not the agent of the principal, and the principal, therefore, had no right to go back to that date and fix it as the time at which he acquired a right to retain the property at the price paid for it by the agent. The other claim would be on the view that the profits were the difference between the real value, or the market value, if a market value exist, and the actual price at which the property was sold by the agent to the principal. I think the principal cannot claim that difference, because it appears to me that in such a case as this, where the principal had no right to claim the property as having been purchased on his behalf at the smaller price, the

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voluntary ratification of the purchase by the principal is equivalent for this purpose to a new sale by the agent to the principal after the relation between them had ceased, and that it is only in consequence of that ratification or adoption that any profits remain in the hands of the agent. In other words, therefore, I think it is not a case of profits made clandestinely or surreptitiously, because those profits have not arisen from the original transaction alone but from the adoption of it by the principal. I think, therefore, that the decision of Mr. Justice *Pearson* was right, and that this appeal must be dismissed with costs.

Solicitors for Appellant: *Harper & Battcock.*
Solicitors for *Fenn*: *Dollman & Pritchard.*
Solicitors for liquidator: *Norton, Rose, & Co.*

H. C. J.

PHELPS, STOKES & Co. *v.* COMBER.

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[1880 P. 965.]

Bill of Exchange—Specific Appropriation—Marginal Advice—Stoppage in transitu—Notice to Consignees to hold Proceeds of Goods.

A firm at *Liverpool* and a firm at *Pernambuco* employed *B.* as their agent at *New York*. According to their course of business the firm at *Pernambuco* received orders from persons there to purchase goods at *New York*. The firm instructed the *Liverpool* firm, who instructed *B.* *B.* then purchased the goods in *New York* and shipped them to the firm at *Pernambuco* with the bills of lading. *B.* drew bills on the *Liverpool* firm to pay for the goods, but not for the precise amount of the shipments, and sold the bills in *New York*. *B.* advised the *Liverpool* firm of the bills, and with the advice forwarded a statement of his account with them. To each bill was attached a counterfoil headed "Advice of draft," and containing a memorandum of amount of the bill and the name of the drawer, with the words "Against shipments *per* (naming the vessel). Please protect the draft as advised above." The *Liverpool* firm on the bills being presented to them for acceptance detached the counterfoils and kept them in their own possession. The Plaintiffs were the holders for value of bills drawn on the *Liverpool* firm in accordance with this course of dealing, the goods having been shipped by *B.* to the *Pernambuco* firm and the bills of lading being also sent to that firm.

On the 10th of June, 1879, the *Liverpool* firm stopped payment, and on the same day *B.* telegraphed to the *Pernambuco* firm as follows: "Having

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pledged documents and shipments (naming the vessel) hold proceeds for *P. & Co.* (the Plaintiffs)." The ship arrived on the 11th of June, but the bills of lading had been previously delivered to the purchasers of the goods.

The three bills having been dishonoured by the *Liverpool* firm, the Plaintiffs brought an action against the *Pernambuco* firm claiming to have the bills paid out of the proceeds of the goods as having been specifically appropriated to meet the bills, and also relying on the telegram as having stopped the goods *in transitu*:—

Held (affirming the decision of *Bacon*, V.-C.), that there was no specific appropriation of the goods either by the course of dealing or by the "advice of draft" attached to the bills.

Frith v. *Forbes* (1) distinguished.

Robey & Co.'s Perseverance Ironworks v. *Ollier* (2) approved.

Held, also that the telegram to the *Pernambuco* firm was not effectual to stop the goods *in transitu*.

Quære, whether under any circumstances a notice to stop goods *in transitu* can be effectual, if addressed to the consignees only, and not to the owner or master of the ship which carries them.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (3).

The facts are fully stated in the previous report. It will be sufficient to state them shortly as follows:—

C. C. Johnston carried on business as a merchant at *Liverpool* under the firm of *Samuel Johnston & Co.*, and at *Pernambuco* in partnership with the defendant *Comber* under the firm of *Johnston, Pater & Co.* Both firms employed *R. B. Borland* as their agent at *New York*. *Borland* was appointed agent of these firms by a written agreement dated the 11th of December, 1877, and signed by himself and *C. C. Johnston*, by which *Borland* was authorized to draw on the *Liverpool* firm for the amount of any orders given by the *Liverpool* and *Pernambuco* firms. The firm at *Pernambuco* were in the habit of receiving orders from persons there for the purchase of goods in *New York*. Upon the receipt of these orders they instructed the *Liverpool* firm to purchase the goods, and the *Liverpool* firm gave instructions to *Borland*. *Borland* then purchased the goods at *New York* and shipped them to the firm at *Pernambuco*, at the same time sending the bills of lading to that firm. To enable him to pay for the goods *Borland* drew bills of exchange on the *Liverpool* firm and sold them in *New York*. The

(1) 4 D. F. & J. 409. (2) Law Rep. 7 Ch. 695.
(3) 26 Ch. D. 755.

bills were not drawn for the precise amount of the shipments, but for round sums which were brought into the current account kept between *Borland* and the *Liverpool* firm. *Borland* advised the *Liverpool* firm of the bills, and with the advice forwarded a statement of his account with them.

To each bill of exchange was attached a counterfoil or marginal advice, headed "Advice of draft," and containing a memorandum of the date and amount of the bill, and the name of the drawer, with the words "Against shipments *per*" (naming the vessel), "Please protect the drafts as advised above and oblige drawer."

The *Liverpool* firm, on the bills being presented for acceptance, detached the counterfoils and retained them in their own possession.

The Plaintiffs, *Phelps, Stokes & Co.*, were the holders for value of three bills drawn by *Borland* on the *Liverpool* firm in accordance with the above course of dealing, the goods purchased with the proceeds of the bills being shipped by *Borland* to the *Pernambuco* firm by the ship *Glensannox*, and the bills of lading being also sent to that firm.

On the 10th of June, 1879, the *Liverpool* firm stopped payment, and on the evening of the same day *Borland*, being advised of their failure, telegraphed to the *Pernambuco* firm as follows:—"Having pledged documents and shipments, *Glensannox*, hold proceeds subject to order *Phelps, Stokes & Co.* and *Bank of British North America*."

On the following day, the 11th of June, the *Glensannox* arrived at *Pernambuco*, and the goods were duly delivered to the customers by whom they were ordered, the purchase-money being received by the *Pernambuco* firm. The bills of lading appear to have been delivered by the firm to the customers who had ordered the goods before the receipt of the telegram by the firm, but the evidence as to the exact time when the telegram arrived was not very clear.

The three bills of exchange having been dishonoured by the *Liverpool* firm, the Plaintiffs brought this action against the *Pernambuco* firm, claiming to have the bills paid out of the proceeds of the goods, on the ground that by the course of dealing between *Borland* and the *Liverpool* and *Pernambuco* firms, and

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also by the effect of the marginal advice annexed to the bills of exchange, the goods were specifically appropriated to the payment of the bills. The Defendants claimed to retain the proceeds of the goods for a debt due to them from the *Liverpool* firm.

Vice-Chancellor *Bacon* held that there was no specific appropriation and dismissed the action without costs. The Plaintiffs appealed from this judgment.

Reid, Q.C., and *Northmore Lawrence*, for the Plaintiffs:—

The statement in the advice note was evidently intended to inform purchasers of the bills that there was a lien on goods for them.

[FRY, L.J.:—If the advice notes were intended to create a charge, would they not be retained by the holder?]

The holder retains the second and third of exchange, and so has advice notes in his possession. It is true that the notes are only addressed to the acceptor, but they were communicated to the holder, and the conclusion would be drawn by any mercantile man that the bills were bills secured on goods. The consignee could only receive the goods on the terms prescribed. The case of *Frith* v. *Forbes* (1) shews that the general lien of a consignee cannot prevail against the express directions of the consignor as to a particular cargo. It was held there that there was a hypothecation, and that an agent who had notice of it must receive the goods subject to it or refuse to receive them at all. Substantially the language of the document was the same there as here. The decision in *Frith* v. *Forbes* has been commented on in *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (2); *Banner* v. *Johnston* (3); *Ex parte Arbuthnot* (4); *Ranken* v. *Alfaro* (5); *Ex parte Dever* (6); and treated as depending on special circumstances, but it has never been overruled, and it governs the present case.

But suppose there was no original intention to give a lien, we say that the telegram of the 10th of June, 1879, gives it. *Borland* at that time was in the position of an unpaid vendor having the

(1) 4 D. F. & J. 409.
(2) Law Rep. 7 Ch. 695.
(3) Ibid. 5 H. L. 157.
(4) 3 Ch. D. 477.
(5) 5 Ch. D. 786.
(6) 13 Q. B. D. 766.

right of stoppage *in transitu*: *Ex parte Banner* (1); *Ireland* v. *Livingston* (2). A person having the right to stop *in transitu* may alter the destination of the goods by notice to the master of the ship, and as we contend, also by notice to the receiver.

The telegram states the existence of a charge, which is equivalent to creating one: *Benjamin* on Sales (3); *Ex parte Golding, Davis, & Co.* (4). It in fact comes to this: "I will stop *in transitu* unless you accept the goods on these terms." *Ex parte Falk* (5) supports our contention.

Marten, Q.C., and *F. Thompson*, for the Defendant *Comber*, were not called on.

COTTON, L.J.:—

This case is an appeal from a judgment of Vice-Chancellor *Bacon*, and the object of the Appellants is to make out that they had a lien on certain goods. The transactions were rather complicated. There was a *Pernambuco* firm and there was a *Liverpool* firm; and there was Mr. *Borland* who was in *New York*, and who was appointed agent on behalf, I will assume, of those two firms. There was another firm, but I will not further allude to it, because it is immaterial. The parties to the *Liverpool* firm and the *Pernambuco* firm were practically the same people, but that also is immaterial. The course of business was this, that the *Pernambuco* firm having received instructions from natives of *Brazil* to purchase goods for them, sent to the *Liverpool* firm, and the *Liverpool* firm sent to Mr. *Borland*, who was in *New York*, with directions to buy whatever was required in *North America*, and then he used to ship those goods, not to *Liverpool* from which he received the instructions, but to the firm at *Pernambuco*, and then, in order to provide himself with the money to pay for the goods, he drew bills on the *Liverpool* firm and discounted or sold them in the market, and thus provided himself with the money. The Appellants are persons who bought a certain set of bills which had been drawn by *Borland* on the *Liverpool* house in order

(1) 2 Ch. D. 278, 288.
(2) Law Rep. 5 H. L. 395.
(3) Pages 839, 843.
(4) 13 Ch. D. 628.
(5) 14 Ch. D. 446; 7 App. Cas. 573.

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to provide for cargo which *Borland* sent to the *Pernambuco* house for the benefit of the native buyers.

Now the first question which was argued, and which we have to decide, is this, whether the purchasers of those bills had, either by agreement or by the note which appears on the face of the bills, a lien or charge on the cargo for the amount of their bills. I do not think it necessary to go through the evidence on the question as to whether there was an express charge besides that which appeared upon the bills, because, in my opinion, the evidence does not support that: it is very indefinite, and there is not, as I understand, any statement by the witness, who candidly admits that he does not know much about it, which would amount to anything like an agreement outside that which appears on the bills, to give to the purchasers of the bills a charge on the cargo to pay for which undoubtedly the bills were drawn.

But then we come to the drafts, and they are in somewhat an extraordinary form, because annexed to the draft as it would be presented in *Liverpool*, there was a bit of paper or margin to be detached in *Liverpool*, in the usual way in which counterfoils are detached, with a pierced line which would shew where it was to be torn off. That is headed "Advice of draft;" it is addressed to the *Liverpool* firm, "*Samuel Johnston & Co., Liverpool*;" it gives the number of the draft, its date, and its amount, and then it says "Against shipments per ss. *Glensannox* to *Brazil*." Then we have below that, printed in red ink, "Please protect the drafts as advised above and oblige the drawer." Then there is Mr. *Borland's* name, and it is dated, "*New York*, May 9th, 1879." That is one of these bills—not the bill which was presented, but one of the parts of it—and with that margin upon it. Now it is said that that note of itself reasonably interpreted, and as it would be understood reasonably by any banker or other person dealing in those bills, creates a charge upon the goods to buy which this bill had been drawn and negotiated. I cannot accede to that view of it. What is it? It is not a direction to be shewn or sent to the persons who are to receive the cargo, it is simply a direction to be sent to the persons who have ordered the cargo, into whose hands the cargo would never come, and who would never have the bills of lading of it; and it is to be detached by them. Now

I think that what is said by Lord Justice *Mellish* in *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (1), one of the cases we have been referred to, is correct, and I am by no means satisfied that merely saying that the bill is drawn against a certain cargo, even when that notice is sent to the person to whom the cargo is consigned, will give a lien or charge on the cargo: but here it is sent to entirely different persons, and I should say, not being myself a mercantile man, that if that direction is sent, not to the person who is to have the command of the goods, or to whom the goods are consigned, but to some one who is a correspondent or agent of that person, and on whom the bills are drawn for the purpose of providing for that cargo, it is merely intended to satisfy him that those bills are really bills drawn legitimately under the arrangement existing between the parties, that he should accept bills for the purpose of enabling cargoes to be purchased and shipped to their correspondent in *Pernambuco*, and also to tell him how he is to keep the accounts with reference to that and other shipments. To my mind, it in no way conveys the idea that it was intended to create anything like a charge or lien on the cargo.

But it is said that there is an authority decided by two eminent judges—*Frith* v. *Forbes* (2)—which is against that view. Now when *Frith* v. *Forbes* is relied upon, as it often is, almost every Judge before whom the case comes says that it must have been decided on the special circumstances of the case, and Lord Justice *James*, when it came before him, says this, in *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (3): "I am of opinion, therefore, that the plaintiffs have no such lien as they claim, and that their bill was rightly dismissed. The decision in *Frith* v. *Forbes* turned upon special circumstances, and can hardly be treated as governing any other case." Lord Justice *James*, therefore, clearly did not understand the case of *Frith* v. *Forbes* as laying down that in principle a mere statement communicated to the consignees of goods that the bill is drawn as against those goods, will of itself give a charge. For he says: "I am not prepared to say that merely because a bill of exchange purports to be drawn

(1) Law Rep. 7 Ch. 695. (2) 4 D. F. & J. 409.
(3) Law Rep. 7 Ch. 698.

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against a particular cargo it carries a lien on that cargo into the hands of every holder of the bill." Then Lord Justice *Mellish* in the same case says: "I am of the same opinion. The indorsement of a bill gives only a right to the bill, and I do not think that any mercantile man would suppose, because he saw in the bill the words 'which place to account cargo per A,' that he was to have a lien on that cargo." Upon what special grounds *Frith* v. *Forbes* (1) was decided it is hardly for us now to consider, but it is obvious that in that case, although the question as to whether the plaintiffs had a lien or charge created in favour of themselves was of importance, yet the real question was whether *Forbes & Co.*, who were the defendants, could insist upon their general lien as against the claim of the plaintiffs, assuming the plaintiffs had a claim. *Forbes & Co.* having received the goods there under special instructions with reference to those bills, intending that they should accept the bills and provide for payment, they had refused to accept them, and yet wanted to keep the goods for themselves, and that really was the principal matter of contest there. Without entering further into that case of *Frith* v. *Forbes*, it is sufficient, in my opinion, to say that here the direction was not given to the person to whom the goods were consigned, but it was given to another person who never would have the goods in his possession or under his control. I should also mention that in another case referred to—*Ex parte Dever* (2)—not only did I say that *Frith* v. *Forbes* was decided under special circumstances, but Lord Justice *Lindley* expressed himself in the same way, as not considering that it laid down the general principle which was there contended for. Therefore, in my opinion, we ought not to consider *Frith* v. *Forbes* as an authority governing the present case, and I am of opinion, especially having regard to the distinction which I have mentioned, that here there was no charge on the cargo created in favour of the bill-holders, either by express agreement or by that which appears on the face of the documents temporarily annexed to the bills, but to be severed from them when the bills were accepted in *Liverpool*, as in fact they were.

Now we come to the other part of the case. The failure of the

(1) 4 D. F. & J. 409. (2) 13 Q. B. D. 766.

Liverpool firm was known in *New York* on the 10th of June, and there was an interview between Mr. *Borland* and the purchasers of these bills. It is not necessary to enter into the circumstances of what took place between them, because, I decide the case entirely without reference to them. On the 11th of June there was a telegram sent to the *Pernambuco* firm: that telegram was certainly sent, and for the purpose of my judgment I will assume, though I do not decide, that that telegram reached the *Pernambuco* firm at the time when the *transitus* was not at an end—that is to say, while the goods were still *in transitu*. We must consider a little what stoppage *in transitu* really is; it is a right given to an unpaid vendor at any time while the goods are still *in transitu*—that is to say, while they are in the hands of the shipowner as carrier; and what is it? It is a retaking by the unpaid vendor, either on the cancellation of the contract, as some people say, or, as I should rather say, on resuming possession for the purpose of insisting on his lien for the price at any time while the goods are in the hands of the carrier, and have not reached the hands of the purchaser or consignee, and when they are not in his possession. What is the consequence? It is that when he resumes possession he has got the goods; he cannot exercise that right to the prejudice of the purchasers for value; but if he takes possession, the purchase-money not having been paid by the purchasers, he can say I cannot prejudice you, but I can hold these goods till you pay me the money which you have contracted to pay, or if there has been a mortgage, then he can seize the goods, subject to the rights of the mortgagee. That is all. It is the consequence of his taking possession of the goods to enforce his vendor's lien; that gives him a right, being in possession before he hands over the goods, to receive from the purchasers any money which may be still unpaid by them; that is not prejudicing their rights at all. But what is this telegram? Is it in any way a stoppage *in transitu?* In my opinion it is not. It is this: "Having pledged documents and shipments, *Glensannox*" (that is, in the *Glensannox*) "hold proceeds subject to order *Phelps, Stokes & Co.* and *Bank of British North America.*" Those are the two parties who had purchased bills drawn against these shipments. Now in my opinion, on the mere construction of that document, it is not a

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declaration that the vendor intends to retake possession. It assumes that the goods will be handed over, and that they will be paid for, because it is not "hold the goods," but "hold the proceeds" subject to the order of *Phelps, Stokes & Co.* I omit all reference to the question whether this could be effectual, being sent to the consignees and not to the carrier who had the cargo; I express no opinion in favour of the view that a notice of stoppage *in transitu* would be effectual if sent to the consignees. But this is not, in my opinion, anything which expresses an intention to retake possession. It is simply an attempted direction as to the way in which the proceeds of this cargo were to be dealt with, and in my opinion there is no right to give any such direction. The case of the *Pernambuco* firm appears to be this. They say, We had already money in the hands of our agents, because they were largely indebted to us, and the bills were drawn as against that; and what they have done is to carry the proceeds of this cargo to the account between themselves and the *Liverpool* firm. Whether that is right or not, in my opinion we need not now decide. But all we have to decide is that the Plaintiffs here, the holders of these bills of exchange, have not either in consequence of that lien claimed on the goods, or in consequence of what is said to be the stoppage *in transitu*, which in my opinion it was not, any right to have the proceeds of these goods applied in order to pay the bills. Therefore, in my opinion, the appeal fails.

LINDLEY, L.J.:—

I am of the same opinion. The first question is, what right, if any, did the Plaintiffs, as the discounters of these bills, acquire to have the goods against which they were drawn applied specifically in taking up the bills? Now, as mere discounters of bills of exchange not accompanied by a bill of lading, they would have no such right at all; but it is said that in consequence of what took place between Mr. *Borland*, who bought the goods in *America*, and the Plaintiffs, and having regard to the memorandum which was attached to the bill of exchange, the discounters of the bill acquired that right. The bill of exchange has attached to it a memorandum, which is rather unusual; but it is an important document. [His Lordship read the "advice of draft," and

continued:—] That memorandum was annexed to the bill of exchange when the Plaintiffs discounted it; and it appears that the course of business was this: that the bill of exchange with that memorandum attached would be presented to the acceptors, the *Liverpool* firm, *Samuel Johnston & Co.; Samuel Johnston & Co.* would then tear off that memorandum and keep it. It is a direction to them, and they tear it off and keep it, in order that they may have the memorandum and act upon it. The discounters of the bill, the Plaintiffs, are then left with the bill of exchange, they do not get the bill of lading: the bill of lading was never attached to the bill of exchange at all, and they never get the ordinary security on the goods which discounters of bills of exchange with bills of lading annexed would get. The bill of lading was sent to *Pernambuco,* and so were the goods; neither the bill of lading nor the goods were sent to *Liverpool.* Can it be established that under these circumstances these discounters have any lien on the goods by virtue of this memorandum? In other words it comes to this: can a transaction under such circumstances as these for any purpose be regarded as practically equivalent to getting the bill of lading? It is clear that that question only has to be asked to answer itself; and such a transaction is never so regarded so far as I am aware. It cannot be said, apart from *Frith* v. *Forbes* (1), that there is any case whatever which warrants the idea that, in a transaction of this kind, the discounter of the bill of exchange gets a lien on the goods against which it was drawn. *Frith* v. *Forbes* is clearly distinguishable, on the ground to which Lord Justice *Cotton* has alluded; and it appears to me that, so far as authorities and decisions go, they are rather against than in favour of the contention that by this memorandum, and what took place when the bill of exchange was discounted, the discounter got any claim on the goods. I quite concur in the view taken by the Vice-Chancellor, and I think it is the correct one, that the discounters made inquiries, and were satisfied that these were honest commercial bills, drawn against goods in the ordinary way, and they trusted to the solvency and respectability of the drawers. That is the real truth of the matter.

Then it is said that apart from that they have a lien if not on

(1) 4 D. F. & J. 409.

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the goods at all events on the proceeds of the sale of the goods by what took place on the 10th of June, 1879. At that time the ship was about to arrive at *Pernambuco*, she did arrive on the 11th of June, the bills of lading had gone forward to *Pernambuco*. The *Liverpool* firm had not got them, and did not intend to have them, still less had the discounters of the bills got them; but under more or less pressure, and a threat of being fired out of the room, whatever that may mean, *Borland* seems to have sent a telegram to *Pernambuco*. Like the Vice-Chancellor, I do not treat those threats as amounting to duress. But *Borland* was under constraint to send the telegram on which so much stress has been laid. That telegram is to the *Pernambuco* firm, and it begins with a statement which was inaccurate in point of fact, because he never had pledged the goods. It says, "Having pledged documents and shipments, hold the proceeds subject to the order of" the persons who discounted the bills, that is the Plaintiffs and the *Bank of British North America*. The question is, what effect, if any, had that telegram on the rights of the parties. It appears to me, I confess, simply to have had none whatever. Mr. *Borland* had no right at that time to dictate to the *Pernambuco* firm how they were to deal with the proceeds of the sale of these goods. It is said that he was in a position to stop these goods *in transitu*. I assume that he was, and that he was agent of the vendors, or in such a position that he might have stopped the goods *in transitu*. He certainly did nothing of the kind; he never intended to do anything of the kind, and the probability is that if he had thought of it he would have seen that it was hopeless for him to attempt to stop the goods *in transitu* at all. In point of fact, as I understand the evidence, the bills of lading had arrived at *Pernambuco*, and had been handed to the native buyers before the telegram reached the hands of the *Pernambuco* firm. I think that is made out when we look carefully at the time: and one of the witnesses says that it was so: and I am not prepared to say that his memory is inaccurate. He would recollect the sequence of events; he would recollect whether he parted with the bills of lading before the arrival of the telegram; but he might not recollect the exact time. And when we come to spell out the time, we find that whether he is speaking accurately or not depends on a matter of ten minutes. One

cannot, under these circumstances, do otherwise than give credit to his testimony. Therefore it so happens that the telegram came too late to stop the goods, and, what is more important, or quite as important to my mind, is that there was no intention to stop them: that was not what *Borland* was trying to do, he never intended anything of the kind, he wanted to impound for the Plaintiffs the proceeds of the sale of the goods, and he had no right to do that. This is a most unfortunate occurrence so far as the Plaintiffs are concerned: but their claim does not appear to me consistent with the principles on which this Court and the other Courts in this country always act in matters of this kind. The Plaintiffs are in the unfortunate position of being unsecured, and not secured, creditors.

FRY, L.J.:—

I entirely concur in what has been said by my Brother Lords Justices. On the first point, it appears to me that whether you look at the parol evidence, or at the advice of draft attached to the bill of exchange, no specific lien or appropriation is made out. I adopt the language of Lord Justice *James* in *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (1), which has been already referred to, when he said, "I am not prepared to say that merely because a bill of exchange purports to be drawn against a particular cargo it carries a lien on that cargo in the hands of any holder of the bill." It appears to me that in the present case all that took place was some assertion of what was perfectly true, that these bills were drawn against an actual transaction, and that they were not accommodation bills; and if the argument which has been addressed to us were to succeed, it would appear to me to follow that every bill of exchange which represented a real transaction, would be a bill having a lien upon the goods which formed the subject of that transaction. That appears to me to be neither law nor mercantile usage. With regard to the advice of draft, it appears to me that there was no intention whatever by that document of creating any charge in favour of the bill of exchange. The nature of the document really contradicts any such contention. It was to be presented to the drawee of the

(1) Law Rep. 7 Ch. 698.

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bill; it was to induce him to accept the bill, and on acceptance it was to be retained by him. This advice of draft would go neither with the bill of exchange nor with the bill of lading, and therefore it seems to me that it was very ill calculated to create a charge on the produce of the one in favour of the holder of the other.

Then with regard to the second question, I come to the same conclusion as my learned Brethren. Assuming, which I do not for the present moment doubt, that *Borland* may have had the right of stoppage *in transitu*; assuming, which I certainly am not yet convinced of, that he might have stopped the goods *in transitu* by a notice addressed neither to the shipowner nor to the captain, but to the consignee, assuming, I say, both these propositions in favour of the Appellants, it remains to be considered whether *Borland* did exercise such a right of stoppage as he might have had. In my judgment he never exercised it nor intended to exercise it. The telegram which he sent suggested that he had already created a pledge upon the property by some previous transaction, and purported to give effect to that pledge by a direction as to the mode in which the proceeds of the cargo should be dealt with. In my opinion he had no right to give any such direction with regard to the proceeds, and therefore whatever *Borland's* right may have been to stop the goods *in transitu*, in my judgment he did not exercise it.

The appeal must therefore be dismissed with costs.

Solicitors: *Hollams, Son, & Coward; Field, Roscoe, & Co.*, agents for *Bateson, Bright, & Warr, Liverpool.*

M. W.

BLAKE *v.* HARVEY.

C. A.
1885
KAY, J.
March 5.
C. A.
May 6.

[1884 B. 4362.]

Rules of Supreme Court, 1883, *Order* XV., *r.* 1; *Order* XXVIII., *r.* 11—*Alteration of Order—Foreclosure Order.*

The Plaintiffs in a foreclosure action applied by summons under Order XV., rule 1, for an account. The Chief Clerk pronounced the usual order for an account and foreclosure. The Defendants objected to the direction for foreclosure, and the Plaintiffs assenting, the order was drawn up for an account only, and was passed and entered in that form. When the parties came before the Chief Clerk to proceed with the account he objected to the order as not being the one he had pronounced, and refused to proceed with the account. Subsequently the Registrar, at the instance of the Chief Clerk, without any motion or summons, altered the order by adding the usual directions for foreclosure. The Defendants moved to strike out the additions. *Kay*, J., declined to do so, as he considered that the parties were not at liberty to have an order drawn up, different from the order pronounced, without applying to the Court for the purpose; but, being of opinion that the addition had been irregularly made, he stayed proceedings under the existing order, giving the Plaintiffs liberty to apply for a fresh order for accounts and foreclosure. The Defendants appealed:—

Held, that assuming the order as passed and entered to contain an error arising from an accidental slip or omission, an alteration made in it without any motion or summons for the purpose was irregular, and must be discharged, and that the Plaintiffs must pay the costs, as they ought to have applied to the Judge when the Chief Clerk refused to proceed with the accounts.

Whether a foreclosure order can be made under Order XV., rule 1, as in *Smith* v. *Davies* (1), *quære*.

Whether there was jurisdiction to stay proceedings under the order against the wish of the Defendants, *quære*.

THIS was an action by mortgagees against the mortgagors for foreclosure of a mortgage.

On the 7th of November, 1884, the Plaintiffs took out a summons "that pursuant to Order XV., rule 1, of the Rules of the Supreme Court, an order may be made for the account claimed by the indorsement on the writ of summons issued in this action on the 8th of September, 1884, with all usual directions in that behalf."

(1) 28 Ch. D. 650.

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The summons was heard by the Chief Clerk of Mr. Justice *Kay* on the 22nd of November, 1884. The Plaintiffs' solicitor deposed that the Chief Clerk pronounced an order for the account and the usual directions for foreclosure. The Defendants' solicitor deposed that he did not hear anything said as to directions for foreclosure. The Chief Clerk, however, indorsed the summons for the usual foreclosure order, and made an entry in his book accordingly. The Registrar gave out minutes containing directions for foreclosure. The Defendants objected to the insertion of these directions, and, the Plaintiffs not insisting upon it, the order was passed and entered on the 18th of December without any such directions. On the 28th of January, 1885, the parties attended before the Chief Clerk to proceed with the account. The Chief Clerk stated that the order had not been drawn up in accordance with what he had pronounced. The Defendants' solicitor submitted that the order having been passed and entered could not be altered. The Chief Clerk replied that he would speak to the Registrar about it. On the 2nd of February the parties attended before the Chief Clerk to proceed with the account, but the Chief Clerk declined to proceed. On the 7th of February the Plaintiffs' solicitor sent to the Defendants' solicitor copy of minutes of an addition which the Chief Clerk proposed to make to the order, being the usual directions for reconveyance on payment to the Plaintiffs by the Defendants of what should be found due within six months from the date of the certificate, and for foreclosure in default of payment. The Defendants' solicitor wrote to say that he could not assent to the proposed addition. The alteration was, however, made by the Registrar at the instance of the Chief Clerk without any summons or motion for the purpose.

The Defendants gave notice of motion that the clause which had been introduced might be struck out of the order.

The motion was heard before Mr. Justice *Kay* on the 5th of March, 1885.

Stirling, for the motion.

D. L. Alexander, for the Plaintiffs.

KAY, J.:—

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I think that this case involves a question of some importance. It appears from the uncontested facts that upon an application for accounts and inquiries under Rules of Court, 1883, Order XV., rule 1, which contains the words "with all necessary inquiries and directions," the Chief Clerk, *i.e.*, the Judge in Chambers—for the direction of the Chief Clerk is in effect the direction of the Judge in Chambers—gave directions in a foreclosure action for the usual accounts and inquiries, with a direction for foreclosure in default of payment. It has been doubted whether that form of direction is right, though the practice has certainly been adopted in some branches of the Court, and in *Smith* v. *Davies* (1) Mr. Justice *Chitty* expressed his approval of it. After that was done the parties went before the Registrar, where some objection was taken to the direction for foreclosure, and the order was drawn up, not as it was directed, but with the direction for foreclosure omitted. It was said that as the parties were *sui juris* they might have any order they liked. No doubt they might if they asked for it and the Court thought it proper to make it. But after an order has been actually made by the Judge, between that and the drawing of it up by the Registrar, it is not competent to the parties, as it seems to me, though *sui juris*, to alter the order so made. The obvious course would be for the parties to come to the Court and say that they have agreed to a modification of the order. It is the order of the Court, and it is perfectly well known that the Court, even where the parties are *sui juris*, often desires to look into the matter to see whether the proposed order is such as should be made. A very familiar instance is where parties *sui juris* say that they have agreed to an order for inquiries and accounts in an administration action and the Court declines to sanction the particular inquiries and accounts and will not allow them to be put into the order. Therefore, it seems to me, that it was not right, without the leave of the Judge, to have the order drawn up otherwise than in the form in which it was pronounced. However, it has been drawn up in a different form, and that having been done, it has been passed and entered. These facts were brought to the knowledge of the Judge in Chambers who

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pronounced the order, and seeing that the form of it was not that in which he made it, he directed that the order should be altered. I have some doubt whether that comes within the rule which allows the Court to alter an order where there has been an accidental slip or omission, but if it does not, and if the parties object to the order as altered, all I can say is that as this order was wrong in either form, I must stay all proceedings under it and leave the parties to take out a summons for inquiries and accounts. As to the costs, I will reserve them, and make such order as to them at the hearing as may be just; or, if it be agreed to, I will give liberty to apply as to the taking of the inquiries and accounts, and also as to the costs.

T. F. M.

The following order was made:—

"The Defendants by their counsel resisting the said order of the 22nd of November, 1884, in its present form, this Court doth order that all further proceedings under the said order of the 22nd of November, 1884, be stayed. And it is ordered that the Plaintiffs be at liberty to make further application to the Judge in Chambers by summons for the purpose of taking the account of what is due to the Plaintiffs for principal and interest on their said mortgage securities, and for payment by the Defendants of what shall be certified to be due to the Plaintiffs, and in default of payment for an order to foreclose the Defendants of all equity of redemption in the said mortgaged premises, and as to the payment of the costs of the action, of the application, and of the said summons."

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The Defendants appealed. The appeal was heard on the 6th of May, 1885.

Stirling for the Appellants:—

The only rule under which a Court of first instance can alter such an order as this, is Order XXVIII., rule 11, and I say that it does not apply. There was here neither clerical mistake nor accidental slip or omission. Mr. Justice *Kay* went on the ground that the order pronounced was final, that the omission must have been by consent, and that no alteration could be made by the parties in the order pronounced by the Court without an application to the Court. But an interpolation in the order, made

without any application by motion or summons, was wholly unauthorized, and must be struck out for irregularity. It is just as if a Judge without consulting anybody had taken his order and altered it.

D. L. Alexander, for the Plaintiffs:—

The Plaintiffs here were put into a difficulty, which has in no degree been occasioned by themselves. The order was pronounced for foreclosure, and was justified by Order xv., rule 1.

[COTTON, L.J.:—I am by no means satisfied that the rule does authorize making a foreclosure order.]

The account would be useless if it does not, a further account would have to be directed at the trial. *Smith* v. *Davies* (1) is a decision that such an order can be made under the rule.

[COTTON, L.J.:—Subject to what you may say, we all think that this alteration in an order passed and entered was wholly irregular, and till you have disposed of that question we will not go into the question whether the order could be made for foreclosure.]

The order was not altered on our application, the Registrar and the Chief Clerk took the matter into their own hands, and the Plaintiffs were helpless.

[COTTON, L.J.:—When the Chief Clerk refused to proceed, you should have gone to the Judge.]

Mr. Justice *Kay* apparently felt that there was an irregularity, and he therefore made an order staying proceedings, which it was within his jurisdiction to do, and it was equally within his authority to give liberty to apply. The question, therefore, resolves itself into one of discretion, with which the Court of Appeal will not readily interfere.

[FRY, L.J.:—I doubt whether he had jurisdiction to stay all proceedings under the order.]

It was an order directing an account against the Defendants, and they cannot complain of its being stayed.

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[FRY, L.J.:—The account might turn out in the Defendants' favour, and they had a right to have it prosecuted.]

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay* under peculiar circumstances. An application was made under Order XV., rule 1, for accounts in a foreclosure action. It is said by the Defendants, that on the hearing of the application they did not hear anything said about the consequential directions. However that may be, the Chief Clerk in his book made a note that he directed accounts with consequential directions, and minutes were prepared on that footing, directing foreclosure on default of payment. The Defendants objected to this. The Plaintiffs' solicitors wrote to say that they did not insist on the insertion of this direction, and would draw up the order without it. It was accordingly so drawn up, passed and entered. When the parties went before the Chief Clerk, he said that the order was not as he had pronounced it, and refused to proceed with the account. The Plaintiffs say they were helpless, but in saying so, they forget that they could have gone before the Judge and asked him to direct that the account should proceed. The Chief Clerk saw the Registrar, who made to the order the addition which is now complained of as being an unauthorized addition to an order passed and entered. Order XXVIII., rule 11, provides that, "clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion or summons without an appeal." No such motion was made, no such summons was taken out, so assuming this to be an error arising from an accidental slip or omission, no proper steps were taken to rectify it. It is very improper to make an addition to the records of the Court without the sanction of an order. Mr. Justice *Kay* ought to have taken care to prevent the records of the Court from containing this unauthorized addition, and to have made the order which we make now to strike it out. Instead of staying proceedings under the order because it was irregular, he ought to have removed the irregularity. To give the Plaintiffs leave to apply for a similar order was unnecessary. They can apply if so advised.

LINDLEY, L.J.:—

The Plaintiffs on the 7th of November, 1884, took out a summons under Order XV., rule 1, asking for the account claimed by the indorsement on their writ of summons. They asked for nothing more than an account—but the Chief Clerk indorsed a memorandum "order for foreclosure in the usual form." The Registrar drew up an order for an account simply, the Plaintiffs assenting—and this order was passed and entered. The parties then went into Chambers, and the Chief Clerk refused to proceed with the account, saying that the order was not the one which he had pronounced, and then he induced the Registrar to make an addition to the order. This was an improper addition to the records of the Court, and whether it was formally passed and entered or not makes no difference; having got on the records irregularly, it ought to be struck out. Mr. Justice *Kay* was asked to do so—he declined, and made an order staying proceedings under this order, and giving the Plaintiffs liberty to apply for a fresh order. There again I think he was wrong, the proper course would have been to set the matter right by restoring the order to the form in which it was originally passed and entered.

FRY, L.J.:—

I am of the same opinion. I think that the course taken as to this record was entirely irregular. The records of the Court ought not to be altered except in the manner provided by the rules. Mr. Justice *Kay* thought that he should do justice by staying proceedings under the order; but as the record was altered in an unauthorized way, the right course in my opinion would have been to direct it to be restored to its proper form by striking out the unauthorized additions, which we now do. As regards the costs, the Plaintiffs urge that this alteration in the order was not owing to them, but was forced upon them. They have, however, availed themselves of it. When the Chief Clerk refused to go on with the accounts, the Plaintiffs ought to have applied to the Judge, who no doubt would have directed the Chief Clerk to proceed. I think, therefore, that the Plaintiffs ought to pay the costs both here and in the Court below.

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COTTON, L.J. :—I agree.

LINDLEY, L.J. :—So do I. The Plaintiffs ought to have asked the Judge to direct the Chief Clerk to proceed.

Solicitors for Plaintiffs: *Blake & Snow.*
Solicitor for Defendants: *E. Chester.*

H. C. J.

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In re GYHON. ALLEN *v.* TAYLOR.

[1884 G. 2981.]

Preliminary Accounts and Inquiries—Rules of Supreme Court, 1883, *Order* XV., *r.* 1; *Order* LV., *r.* 10.

A mortgagee of shares of the proceeds of the residuary real and personal estate of a testator who died in 1872, brought an action in 1884 for the administration of the estate, alleging misapplication by one of the trustees of moneys raised by mortgage of parts of the real estate, and advances to the same trustee of parts of the testator's estate on equitable mortgage. The Plaintiff applied under Order XV., r. 1, for the common accounts and inquiries in an administration suit, and also for inquiries as to mortgages of the real estate and as to advances to the trustee. *Bacon*, V.-C., refused to make any order:—

Held, on appeal, that only common accounts and inquiries could be directed on an application under the rule, and not accounts and inquiries the right to which depended on the Plaintiff establishing a case for them at the hearing, and that the special inquiries therefore could not be directed.

Held further, that Order XV., r. 1, must be read in connection with Order LV., r. 10, which makes it not obligatory on the Court to order a general administration, and that the Vice-Chancellor was right in refusing the common accounts and inquiries in a case where, having regard to the period elapsed since the testator's death, it was uncertain whether a general administration order would be found at the hearing to be desirable, and where, if the Plaintiff at the hearing established a case of breach of trust, accounts and inquiries would have to be directed, going over in part the same ground as the common accounts and inquiries.

W. L. GYHON died in October, 1872, leaving a will by which he gave his real and personal estate to *R. Carter* and *C. T. Taylor* upon trust for conversion, and, subject to a life annuity, upon

trust to pay the income of the proceeds to *C. T. Taylor* for life, then to his wife for life, and after her death, subject to a legacy of £600, in trust for four persons equally. *Carter* and *Taylor* proved the will. *Carter* died in 1884, and *Emily Carter* was his executrix. The Plaintiff claimed to be the legal personal representative of a person to whom *C. T. Taylor* and his wife and three of the four persons to whom the residue was bequeathed had mortgaged their interests, and he commenced this action in December, 1884, against *C. T. Taylor* and *Emily Carter* to have the testator's estate administered. The statement of claim alleged that *Carter* and *C. T. Taylor* had sold some of the testator's real estate and received large sums of money, part of his personal estate, for which they had never accounted. It further alleged that *Carter*, in breach of trust, mortgaged, by deposit of deeds and otherwise, to various persons, portions of the testator's real and personal estates, and received from such mortgages large sums of money which he applied to his own purposes, and that he and *Taylor* advanced to him (*Carter*) personally, on the security of equitable mortgages, large sums part of the testator's estate, and that *Carter* had since mortgaged the properties comprised in those equitable mortgages to other persons who now claimed priority over the testator's estate. The claim was to have the real and personal estate of the testator administered and the trusts of his will carried into execution.

The estate of *Carter* was in course of administration by the Court.

The Plaintiff took out a summons for an order for accounts and inquiries under Order XV., r. 1. He asked for the ordinary accounts and inquiries, and also an inquiry as to the mortgages made by *Carter*, and an inquiry as to advances made to him. The summons was adjourned into Court and Vice-Chancellor *Bacon* declined to make any order. The Plaintiff appealed.

Marten, Q.C., and *Chester*, for the appeal:—

The Vice-Chancellor cannot have understood the facts. He says that we can obtain relief by applying in the action for the administration of *Carter's* estate; but before we apply in that action we must establish the amount of our claim against *Carter*,

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and an administration of *Gyhon's* estate is necessary for that purpose. There is no preliminary question to be tried, and the accounts and inquiries which we ask are necessary.

Vennell, for *C. T. Taylor*, supported the appeal.

Warrington, for *Emily Carter*:—

Under Order XV., r. 1, only the common accounts and inquiries can be directed. Two special inquiries are here asked for, of a description which is not usual unless a *primâ facie* case of breach of trust is made out. These special inquiries are not within the indorsement on the writ, and the right to any such inquiry ought to be determined at the hearing. Even the common accounts and inquiries ought not to be directed now, for it may very well turn out at the hearing that there is nothing to decide except the question as to the alleged breaches of trust, and that a general administration order, which the Court now is not bound to make, is unnecessary. It would, moreover, be very inconvenient to have common accounts and inquiries directed when special accounts and inquiries going partly over the same ground may have to be directed at the hearing.

Marten, in reply:—

The special inquiries only tend to bring out facts and do not settle any liability.

[FRY, L.J.:—It is not the practice to direct special inquiries unless a special case is made out.]

At all events there is no objection to the common accounts and inquiries. Why should not a trustee account in the ordinary way, leaving any question as to breach of trust to be settled afterwards? There is no question preliminary to the common accounts.

[FRY, L.J.:—Would it be right to make an order for a common account when the Plaintiff intends to insist on an account on the footing of wilful neglect and default?]

That is not the case here. An account on the footing of wilful neglect and default was considered contradictory to a decree for

a common account. Here the question is as to moneys alleged to have been lent improperly. Such a claim is not inconsistent with taking the common accounts, which will clear the way for the claim.

COTTON, L.J. :—

This is an appeal from the refusal of Vice-Chancellor *Bacon* to direct accounts and inquiries on a summons taken out under Order XV., r. 1, which provides that "where a writ of summons has been indorsed for an account under Order III., r. 8, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions now usual in the Chancery Division in similar cases, shall be forthwith made." Under that rule only those accounts can be directed which are necessarily involved in the relief sought by the writ of summons. The writ here is indorsed for administration, and only the accounts and inquiries which are necessary in an administration suit can be directed under this rule. The two special inquiries for which the Plaintiff asks do not come within that description, but point to alleged breaches of trust which ought to be determined at the hearing. These are not within the rule, and nothing could now be directed but ordinary administration accounts.

Then was the Vice-Chancellor right in saying that he would not make an order even for these accounts. I am unable to differ from him. If there are ordinary accounts which must in any event be taken, and those accounts are quite distinct from those the right to which depends on the Plaintiff's success at the hearing, it may be proper that they should be ordered at once. But if those accounts are involved with the subsequent accounts which will have to be taken if the Plaintiff succeeds at the hearing, it would not, in my opinion, be right to direct them to be taken forthwith, and here it appears to me that they are so involved.

The Vice-Chancellor also went on another ground. There is an action in which the estate of *R. Carter*, the deceased trustee, is being administered. The Vice-Chancellor no doubt had in his

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mind Order LV., r. 10, which provides that it shall not be obligatory on the Court or a Judge to make an order for administration if the questions can be properly determined without such order, and he thought it best not to direct preliminary accounts, but to leave it to be decided at the hearing whether any breach of trust had been committed, and if so whether a claim against the estate of *Carter* would not settle the questions to be decided without ordering a general administration of the testator's estate.

LINDLEY, L.J.:—

I am of the same opinion. I do not wish to restrict the operation of Order XV., r. 1, but in applying it we must bear in mind Order LV., r. 10. The testator died in 1872, and I am not satisfied that it will at the hearing be found necessary to direct the ordinary accounts and inquiries. Some of the inquiries and accounts proposed are consequential on a finding that there has been a breach of trust, and they cannot properly be directed now. I felt some doubt whether the ordinary accounts and inquiries ought not to have been directed, and I should have been inclined to think that they ought, but for the reason that they may turn out to be unnecessary.

FRY, L.J.:—

I am of the same opinion. I think that there was in this case a "preliminary question to be tried," viz., whether it would ever be necessary to take the ordinary accounts at all. It is very probable that it may turn out at the trial that the only questions to be decided relate to the alleged breaches of trust, and that there is no need for a general administration. The appeal therefore fails.

Solicitors for Appellant: *J. J. & C. J. Allen.*
Solicitors for Respondent: *Bell, Brodrick, & Gray.*

H. C. J.

In re BENN.
BENN *v.* BENN.

[1877 B. 129.]

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Will, Construction—"Surviving."

A testator devised to each of his children an estate for the life of that child, with remainder to the children of that child, and in case any or either of the testator's children should die without leaving any child or children him, her, or them surviving, then the testator devised the estates to which their child or children respectively would have been entitled under his will, if living, to his, the testator's, surviving children for their respective natural lives, and after their deceases respectively he gave their respective shares to their respective children, their heirs, executors, administrators, and assigns. There was no gift over on the death of all the testator's children without leaving children. *C.*, one of the testator's children, died without leaving issue. Some of the other children were then living; others had died leaving children of theirs then living:—

Held, that the word "surviving" was to be read in its proper sense, and that the children of those children of the testator who had predeceased *C.*, took no interest in the estate of which *C.* was tenant for life.

The fact that the original shares are all settled by the will, and that the shares which the "survivors" take in the share of a child who dies without issue, are settled in the same way as their original shares, is not by itself sufficient to shew that "survivors" is used otherwise than in its proper sense.

CHARLES BENN, by will dated the 1st of September, 1840, gave his real estate to trustees upon trust as to a certain specified part thereof, to the use of *Hannah*, the wife of his son *James*, for her life, if she should so long remain unmarried, and after her decease to the use of *James Benn* for life, and after the decease of the survivor of them, or if *Hannah* should survive her husband and marry again, then to the use of the children of *James Benn* as tenants in common in fee; and as to a certain other part of his real estate, to uses in favour of his son *George Benn* and his wife and children precisely similar to the above; and as to certain other part to the use of his daughter *Elizabeth Cranage* for life, with remainder to her husband for life, with remainder to her children as tenants in common in fee; and as to the freehold land called "*Beavers*," to the use of his son *Charles* for his life, with remainder

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to his wife for life if she so long remained unmarried, with remainder to the children of *Charles* as tenants in common in fee: and as to a certain other part of his estate, to uses in favour of his daughter *Susan Evans* and her husband and children similar to those of *Elizabeth's* property; and as to a certain other part to uses in favour of his son *Jonathan* and his wife and children similar to those of *Charles's* property; and as to a certain other part, to uses in favour of his daughter *Caroline Baldwin* and her husband and children, similar to those of *Elizabeth's* property. He directed his trustees to set apart a sum which would produce £30 a year, and to pay the income to his son *William* for life, and after his death to divide the fund among all the testator's grandchildren equally who should be living at the decease of *William Benn*. He bequeathed his personal estate to his trustees upon trust to pay over the residue in equal shares unto and amongst all and every his said sons and daughters: "And in case any or either of my said sons or daughters shall depart this life without leaving any children or child him, her, or them surviving, then I give, devise, and bequeath the several estates and interests to which their children or child respectively would have been entitled under this my last will, if living, unto my surviving sons and daughters, for the term of their respective natural lives, and after their deceases respectively, then I give their respective shares unto their several and respective children, their heirs, executors, administrators, and assigns."

There was no gift over on the death of all the children without leaving issue, nor did the will contain any residuary devise.

The testator died shortly after the date of his will, leaving the eight children named in his will surviving him. *Charles Benn*, the son, survived his wife and died in 1873 without having had a child. At his death the only children of the testator who were living were *Mary Benn*, *Susan Evans*, and *Jonathan Benn*. *Caroline Baldwin* had died in his lifetime, leaving issue one child, *Hannah Baldwin*; and *James Benn*, *Elizabeth Cranage*, and *William Benn* had also died leaving children living at the death of *Charles Benn* the son.

This action was brought in 1877 by *Mary Benn* and *Susan Evans* against *Jonathan Benn* and *Hannah Baldwin* to have the

construction of the will determined. *Hannah Baldwin*, by her defence, claimed to be entitled to one-seventh share of "*Beavers*," and by counter-claim asked for sale or partition. The Plaintiffs demurred to the counter-claim, and to so much of the defence as claimed the seventh share. The demurrer was heard before Vice-Chancellor *Hall* on the 18th of July, 1877, and was allowed.

On the 26th of November, 1877, judgment was given directing inquiries as to the testator's property, and as to his children and their children. These inquiries having been answered, the action came on for further consideration on the 25th of February, 1884, before Mr. Justice *Kay*, who, without giving any opinion of his own, followed the decision of Vice-Chancellor *Hall* on the demurrer, and made an order declaring that only the children of those children of the testator who survived *Charles Benn* the son became entitled in equal shares *per stirpes* to the property called *Beavers*. The children of *James Benn*, who had been served with notice of the judgment and attended the proceedings, appealed.

The appeal was heard on the 16th and 18th of May, 1885.

Robinson, Q.C., and *Langworthy*, for the Appellants:—

We contend that in this case "survivors" should be read "others," although there is no gift over. We say that where the original share is settled, and an accrued share is given by way of accretion to it, "survivor" should be read "other" in order to carry out the intention, there being a gift to a *stirps*. We rely on *Waite* v. *Littlewood* (1).

[LINDLEY, L.J.:—Have you any case in your favour without a gift over?]

Yes. *Eyre* v. *Marsden* (2); *Hodge* v. *Foot* (3); and *In re Arnold's Trusts* (4) are such cases.

[LINDLEY, L.J.:—*Wake* v. *Varah* (5) is not consistent with *In re Arnold's Trusts* and other cases of the same class.]

But see judgment of Lord Justice *Baggallay* (6). *In re Walker's Estate* (7); *Lucena* v. *Lucena* (8). In the last case some

(1) Law Rep. 8 Ch. 70.
(2) 4 My. & Cr. 231, 239.
(3) 34 Beav. 349, 351.
(4) Law Rep. 10 Eq. 252.
(5) 2 Ch. D. 348.
(6) Ibid. 354-5.
(7) 12 Ch. D. 205.
(8) 7 Ch. D. 255.

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of the shares were settled and some not. There was, however, a gift over. *In re Horner's Estate* (1) the Vice-Chancellor considered the case before him to be governed by *Beckwith* v. *Beckwith* (2). In that case the original gift was to daughters living at the death, so the subsequent limitation to survivors must have referred to a different survivorship. Here there is a distribution *per stirpes* in settlement, which excludes the idea that there can have been an intention to benefit a class living at a particular time.

[FRY, L.J.:—Is that fact sufficient to exclude it?]

Waite v. *Littlewood* (3) supports the view that it is. But for *Beckwith* v. *Beckwith* we should not be in much difficulty.

[FRY, L.J.:—Which of the earlier cases do you consider the strongest in your favour?]

Hodge v. *Foot* (4).

[FRY, L.J.:—The vague reference to the "scope and object of the will" in that case is not satisfactory.]

In *Beckwith* v. *Beckwith* the scope of the will was different, for the testator began with a gift to survivors. *In re Arnold's Trusts* (5) and *In re Walker's Estate* (6), in neither of which was there any gift over, support our case, and *Eyre* v. *Marsden* (7) is strongly in our favour. The intention to provide for children as well as parents is sufficient to alter the construction. The observation of Lord Justice *Cotton* in *Lucena* v. *Lucena* (8) is for us. A gift over is conclusive, but a scheme of cross-limitations has been held sufficient: *Goodman* v. *Goodman* (9).

[LINDLEY, L.J.:—Did not the decision there turn on the expression "in manner aforesaid"?]

There is nothing in the report to shew that it did. If we look at the general scope of the will, the intention is clear. We have not a gift to a class and then a settlement of the shares, but seven specific devises in settlement, and then, in failure of

(1) 19 Ch. D. 186.
(2) 25 W. R. 282; 46 L. J. (Ch.) 97.
(3) Law Rep. 8 Ch. 70.
(4) 34 Beav. 349.
(5) Law Rep. 10 Eq. 252.
(6) 12 Ch. D. 205.
(7) 4 My. & Cr. 231.
(8) 7 Ch. D. 255, 270.
(9) 1 De G. & Sm. 695

the objects of any one devise, the devised estate is given over to the testator's surviving children for their lives with remainder to their children. If the last surviving child of the testator died without issue, there would be an intestacy as to the estate devised to him, which is an inconvenient result, and one which the testator cannot have intended.

Kekewich, Q.C., and *E. S. Ford*, *Hastings*, Q.C., and *Mulligan*, *W. Pearson*, Q.C., and *Vaughan Hawkins*, *Eastwick*, *Woodhouse*, and Sir *A. Watson*, appeared for other parties, but were not called upon.

COTTON, L.J.:—

This is in form an appeal from an order of Mr. Justice *Kay*, but as he simply followed a previous decision of Vice-Chancellor *Hall* without giving any opinion of his own, it is really an appeal from Vice-Chancellor *Hall*, the reasons for whose decision we do not know. The question is, as to the construction of a clause of accruer. The testator did not give his real estate in shares among his children, but gave specified estates to his seven children respectively for their respective lives, with limitations over to their respective children. Then followed this general clause: "And in case any or either of my said sons or daughters shall depart this life without leaving any children or child, him, her, or them surviving, I give, devise and bequeath the several estates and interests to which their children or child respectively would have been entitled under this my last will, if living, unto my surviving sons and daughters for the term of their respective natural lives, and after their deceases respectively then I give their respective shares unto their several and respective children, their heirs, executors, administrators and assigns."

Charles Benn, one of the sons, died without ever having had a child. At his death there were living three of the testator's children. The others had died in the lifetime of *Charles*, leaving children, and the question is, to whom the estate devised to *Charles* for life now belongs.

It is to be observed that by the clause of accruer the testator, after the respective deceases of the children described as his

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surviving sons and daughters, gives "their respective shares" to their respective children. The expression "their respective shares" most naturally denotes the shares which they respectively took for life, and this makes against the claim of the children of a son or daughter who never took an estate for life. But in my opinion the construction of the clause does not turn on anything so minute as that. "Surviving" means living beyond some period. Now the true rule for construing a will is, that if a rule has been laid down fixing in the absence of any expressed intention the meaning of a word, then that meaning is to be given to it unless there is something in the context to vary the meaning, and if no such definite rule has been laid down, then the words are to be taken in their natural sense. There is no canon as to the period to which survivorship is to be referred, except that in an immediate gift it is to be referred to the death of the testator, and if there is a life estate then to the determination of the life estate. Here the natural meaning of "surviving" is living at the death of the child, the estate devised to whom for life is given over on his death.

It is said that the intention of the testator is shewn to be that the clause should be construed otherwise. If such an intention is sufficiently indicated effect ought to be given to it. But, in my opinion, to read "surviving" as meaning "others" would defeat the intention, for the clause of accruer is to take effect only in the event of a child dying without leaving any child him surviving. The word "surviving" must there be read in its natural sense, and to give it another sense in the same clause would be a forced construction.

It is said that when all the shares are settled, and there is a general clause of accruer on the death of the tenant for life without children, the accrued shares being settled in the same way as the original shares, that is a sufficient indication of intention that "survivors" means "others." I am not aware of any such rule. No doubt such a scheme of disposition tends in favour of the view contended for, and when it is followed by a gift over in the event of all dying without issue there is sufficient evidence of an intention not to use the word "survivors" in its proper sense, but whether a scheme of disposition of this kind without a

gift over is sufficient evidence of such an intention is a very different matter. *Waite* v. *Littlewood* (1) was relied upon by the Appellants, and the opinion of Lord *Selborne* is entitled to great weight, but in that case there was not only a settlement of the accrued shares but a gift over. It is said that Lord *Selborne* did not rely on the gift over, but I do not collect that from his judgment. The settlement of the shares is no doubt important, but I think that he mainly relied on the gift over. In *Lucena* v. *Lucena* (2) the residue was given to the testator's children equally, the sons taking their shares absolutely, the shares of daughters being settled. Then there was a gift over of the shares of children dying under certain circumstances, to his surviving children in the same manner as was provided with respect to their original shares, and there was a gift over in case of the death of all his children without issue. It was held that there was enough to prevent the word "surviving" from having its natural meaning. The Master of the Rolls held that surviving children meant those who survived in person, or figuratively in issue taking an interest under the will. The Court of Appeal agreed with the Master of the Rolls that the word "surviving" was not to be taken in its strict sense, but considered that sons who did not survive either personally or in issue taking an interest under the will were let in. The Court said (3), "The fact of shares being settled, and the fact of the ultimate gift over being only to arise in the event of a failure of all children and issue who are objects of the testator's bounty, are circumstances each of which may properly be relied upon as shewing that 'survivors' is not to receive its strict construction. Each of these circumstances exists in the present case. If, with the gift over standing as it does, there had been no settlement of the daughters' shares, we are of opinion that the word 'surviving' would not have received its strict construction, and must have been construed 'other;' and our opinion is that the circumstance of the shares of some of the children named in the will being settled is not sufficient to give to the word 'surviving,' as a matter of construction, the meaning of 'survivors' in person or in issue taking an interest under the will, though that would

(1) Law Rep. 8 Ch. 70. (2) 7 Ch. D. 255.
(3) 7 Ch. D. 269.

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have been the effect of the gift to survivors if the shares of all the children, and not of some only, had been settled." It is not there said that the fact of the shares being settled would have been enough to vary the meaning of the word "surviving" though it was held enough when combined with the ultimate gift over. There are cases which seem to support the contention that a settlement of the shares is sufficient, but it has never been decided that it is so, and none of the latter cases tend to recognise it as by itself sufficient.

LINDLEY, L.J.:—

The dispositions are rational and intelligible if we give to the word "surviving" its proper meaning; why, then, should we attribute to it a different meaning? Apart from authority there would be no difficulty, and, as to authorities, the tide has turned. *Wake* v. *Varah* (1), *Lucena* v. *Lucena* (2), and *Beckwith* v. *Beckwith* (3) settle the case. The argument on the appeal has mainly turned on the observations of Lord *Selborne* in *Waite* v. *Littlewood* (4). But Lord *Selborne* cannot have looked at the will in that case without reference to the gift over; and he must be considered to have borne it in mind in the remarks which he made. The question of the survival of the *stirps* is fully discussed in the last edition of *Jarman* on Wills (5).

FRY, L.J.:—

I am of the same opinion. The Appellants rely on two circumstances, first, that the original gifts are settled and the gifts to surviving children are settled in the same way, and they say that the settlement of the shares given over is strong to shew that the testator, when he spoke of surviving children, must have meant children who survived either personally or by issue interested under the will; and secondly, they observe on the absence of a residuary gift owing to which the construing "surviving" in its proper sense might produce intestacy.

(1) 2 Ch. D. 318.
(2) 7 Ch. D. 255.
(3) 25 W. R. 282; 46 L. J. (Ch.) 97.
(4) Law Rep. 8 Ch. 70.
(5) 4th Ed., vol. ii., pp. 699–703.

Now, if the cases had laid down a rule that the settlement of the gifts over in the same way as the original shares was enough to alter the meaning of the word "surviving," I should bow to this rule, but I do not find that the cases go any further than to say that it is a circumstance to be regarded. As to the second point: the avoiding intestacy is to be regarded in construing doubtful expressions, but is not enough to induce the Court to give an unnatural meaning to a word. There are, moreover, expressions in the present will which are against the Appellants. Their argument would oblige us not only to read "surviving" as meaning "other," but to read "their respective shares" as meaning "shares which they would have taken if they had lived up to that time." The word "surviving" when it first occurs in the clause of accruer is used in its strict sense, which makes it more difficult to read it otherwise in the latter part of the clause. Again, the testator, when he meant to dispose of shares which persons would have taken if they had lived, used appropriate language. All these are reasons against departing from the natural sense of the word "surviving." The appeal must be dismissed.

Solicitors for Appellants: *H. A. Graham.*

Solicitors for other parties: *Hedges & Brandreth; Wright & Pilley; Patey & Warren; Abbott.*

H. C. J.

C. A.
1884
CHITTY, J.
April 24; *May* 19.
C. A.
1885
May 19, 21.

BROWN, SHIPLEY, & CO. *v.* KOUGH.

[1881 B. 3841.]

Bill of Exchange—Equitable Assignment—Specific Appropriation—Direction on Bill to charge it to Account of Cargo as advised—Contemporaneous Letter of Advice.

A. purchased from *B. & Co.* in *America* a bill of exchange dated the 5th of August, 1875, payable sixty days after sight, for £2500 drawn upon *K.* in *London*, on the face of which was a direction "to charge the same on account of cheese per *Britannic* and lard per *Greece* as advised," and on the same day *B. & Co.* wrote to *K.* a letter of advice, inclosing bills of lading for the cheese and lard, and informing *K.* that as against these they valued on him at sixty days' sight for £2500 favour *A.* The bill was not accepted, *K.* having heard that *B. & Co.* had suspended payment on the 7th of August; but, on the arrival of the consignments in *England*, *K.* took possession of them and realised them, receiving the proceeds, out of which he claimed to retain a balance due to him on the general account between him and *B. & Co.*

From the evidence as to the course of dealing between *A.* and *B. & Co.*, it appeared that *B. & Co.* had for many years previously been in the habit of consigning American produce to *K.*, and drawing bills on him in a similar form to that of the 5th of August, but that there had not been any practice of specifically appropriating the remittances to meet any particular bills.

A. brought an action against *K.* and the trustee in bankruptcy of *B. & Co.* claiming to be entitled to a charge on the proceeds of the cheese and lard in priority to all other persons. No question was raised as between *K.* and the trustee in bankruptcy as to their respective rights:—

Held, by the Court of Appeal (affirming the decision of *Chitty*, J.), that *A.* was not entitled to the charge claimed, either (1.) on the ground that the direction on the face of the bill of exchange operated as an equitable assignment; or (2.) that on the authority of *Frith* v. *Forbes* (1), the letter of advice created a specific appropriation of the remittances to meet the bill in favour of *B. & Co.*, the benefit of which was transferred to *A.* by the direction on the bill of exchange.

The case of *Frith* v. *Forbes*, if and in so far as it intended to lay down that, as a general principle of law, such a letter of advice created a specific appropriation in favour of the consignors and drawers of the bill, the benefit of which was transferred by the direction on the bill to the bill-holders—is erroneous, and must not be followed.

THE Plaintiffs carried on business under the firm of Messrs. *Brown, Shipley, & Co.*, as merchants in *London* and *New York*.

(1) 4 D. F. & J. 409.

The Defendant *Kough* carried on business as a commission merchant in *London* by himself under the firm of *Jones Brothers*.

In and previously to August, 1875, *Archibald Baxter* and *Duncan C. Ralston* carried on business as provision merchants in *New York* under the firm of *Archibald Baxter & Co.*

The last-mentioned firm on the 5th of August, 1875, consigned to the Defendant *Kough* cargoes of lard and cheese by the ships *Greece* and *Britannic*, and on the same day drew a bill of exchange upon his firm in the following form:—

Archibald Baxter & Co.

"*New York*, 5th Aug. 1875.

"Exchange for £2500.

"Sixty days after sight of this first of exchange (second and third unpaid) pay to the order of Messrs. *Brown, Shipley, & Co.*, in *London*, two thousand five hundred pounds sterling, value received, and charge the same to account of cheese per *Britannic* and lard per *Greece*, as advised.

"Messrs. *Jones Brothers*,

"*London.* (Signed) *Archibald Baxter & Co.*"

On the same day the said firm wrote to the Defendant *Kough* a letter inclosing bills of lading of lard and cheese, which, so far as material, was as follows:—

"We inclose bill of lading for 1558 boxes [of cheese] per *Britannic*, and against these and lard per *Greece* we value on you at sixty days sight for £2500, favour *Brown, Shipley, & Co.*"

On the 6th of August the said firm of *Baxter & Co.* drew another bill of exchange upon the Defendants' firm as follows:—

Archibald Baxter & Co.

"*New York*, 6th Aug. 1875.

"Exchange for £1000.

"Sixty days after sight of this first of exchange (second and third unpaid) pay to the order of Messrs. *Brown, Shipley, & Co.*, in *London*, one thousand pounds sterling, value received, and charge the same to account of cheese per *Britannic*.

"Messrs. *Jones Brothers*,

"*London.* (Signed) *Archibald Baxter & Co.*'

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And on the same day they wrote to the said Defendant a letter which, so far as material, was as follows:—

"Confirming our respects of yesterday we have now to hand your invoice for 3298 boxes and B/L for 1740 boxes cheese per *Britannic*, on account of which we value on you at sixty days for £1000, favour *Brown, Shipley, & Co.*"

The Plaintiffs purchased the two bills in *New York* through Mr. *J. E. Johnson*, a member of their firm in that city. The bills on arrival in this country were presented on the 17th and 18th of August to the Defendant for acceptance, but he, having heard in the meantime that the drawers had suspended payment on the 7th of August, refused to accept them, and on their presentation for payment on the 19th and 20th of October, 1875, refused payment.

Baxter & Co. were adjudicated bankrupts, and the Defendant *J. N. Tappan* was appointed the trustee in their bankruptcy.

The goods on their arrival in *England* were taken possession of and sold by the Defendant *Kough*, who received the proceeds of sale, and claimed to retain out of the net proceeds the balance due to him on his general account with *Baxter & Co.*

The Plaintiffs, on the 11th of July, 1881, issued their writ in this action against *Kough* and *Tappan* claiming a declaration that they were entitled in priority to all other persons to a valid charge on the consignments and their proceeds for the amount of the two bills of exchange, and to have such proceeds applied in or towards satisfaction of the said bills, or that the interests of the Plaintiffs and Defendants in the said consignments, and the proceeds of sale thereof, might be ascertained and declared—and claimed an injunction to restrain *Kough* from parting with the proceeds of sale.

In support of their claim *J. E. Johnson* filed an affidavit in which (par. 3) he stated:—"Prior to purchasing the bills I made inquiries of *Archibald Baxter*, a member of *A. Baxter & Co.*, by whom the said bills were drawn, and he personally assured me that all bills that would be drawn by him upon his correspondents in *England*, including *Jones Brothers*, were regular, and against shipments specified in the advices of his said firm to his corre-

spondents, including *Jones Brothers*, upon whom the said bills were drawn."

The said *A. Baxter* in an affidavit in answer stated (par. 3), that long prior to the suspension of *Baxter & Co.*, *Johnson* had asked him whether in drawing bills offered to them (the Plaintiffs) for sale he would object to noting in the bills the merchandize out of the proceeds of which they were expected to be paid, and that he had since, with some exceptions, drawn the bills in similar form to those the subject of this action . . . . but that it was not suggested by *Johnson* or the Plaintiffs, prior to the suspension, that he or they supposed or understood that they were thereby obtaining any specific lien upon merchandise consigned, and that he made no representations or assurances to *Johnson* respecting the particular bills in question.

The course of dealing between the firms of *Baxter & Co.* and *Jones Brothers*, as detailed in an affidavit of the Defendant *Kough*, which was not contradicted, was as follows:—That *Baxter & Co.* for many years previously to their failure were in the habit of consigning American produce and goods to the Defendants' firm as their factors, and also for sale on the joint account of the two firms—if the Defendant's firm accepted the goods on the joint account he sold them, and debited *Baxter & Co.* with half the loss, or credited it with half the profits on the sale. Except in cases where the Defendant had previously agreed to the shipment being on joint account, he always had the option of refusing to accept the goods on that account—and in that event he sold them as the consignee and factor of *Baxter & Co.*

That *Baxter & Co.* also frequently procured consignments of goods to be made through them to the Defendant's firm by other persons in *America* to whom they made advances upon the bills of lading of such goods—forwarding the bills of lading to the Defendant's firm and drawing upon it for the amount of the advances which they stated they had made to such other persons against such consignments. The Defendant's firm sold those consignments, and credited *Baxter & Co.* with the proceeds of the sales.

That the Defendant's firm occasionally sent out orders to *Baxter & Co.* to buy goods in *America* on behalf of persons in *England*, and for the price of these goods the Defendant was alone liable to

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Baxter & Co., and on the receipt from them of the goods so ordered, he handed them over to the purchasers in *England*, and credited *Baxter & Co.* with the purchase-moneys.

That during the whole course of the previous transactions, and throughout the correspondence between the Defendant's firm and *Baxter & Co.*, it had never been suggested that any persons or firm had any charge or lien on any consignments made to the Defendant's firm, or on their proceeds, in respect of any bills of exchange drawn by *Baxter & Co.* upon the Defendant's firm.

That throughout the whole course of such transactions the bills of lading of all consignments had always been sent direct to the Defendant's firm.

(Par. 16.) That although *Baxter & Co.* were in the habit of drawing on the Defendant's firm in anticipation of sales, and the bills so drawn frequently referred on their face to certain consignments in a similar way to that expressed in the bills in question, the Defendant's firm was not under any engagement to accept any of the bills of exchange drawn upon them, and when the Defendant did accept such bills in his firm's name, he did so on the general credit of *Baxter & Co.*, and on the faith of their being solvent and able to pay any deficiency in the proceeds of sale of their consignments to meet the amount of the Defendant's acceptances, which acceptances were always general, and were not intended to charge the proceeds of sale of the goods against which such bills might be expressed to be drawn or the goods themselves; that the Defendant did not specifically appropriate such goods or proceeds to the payment of such bills, and he always carried the net proceeds of sale of all consignments to the credit of, and the amount of all his acceptances to the debit of, the said firm of *Baxter & Co.* in their general account with his firm.

That as occasionally, owing to the weather or state of the market, the Defendant could not rely upon the consignments realising the amount of the invoice price for which *Baxter & Co.* were in the habit of drawing upon him, he always reserved to himself the right of refusing to accept any bill if he anticipated a loss on any of the shipments.

This evidence as to the course of dealing was corroborated by the affidavit of *A. Baxter*, one of the partners in *Baxter & Co.*

With regard to the effect which was, according to mercantile usage, to be attributed to a direction on a bill of exchange to charge the amount of the bill against particular shipments, the evidence was contradictory. The Court, however, came to the conclusion that the true effect was stated in the affidavit of a Mr. *Bowring* as follows:—

"Mercantile men when purchasing bills of exchange on the face of which there is a direction to the persons on whom such bills are drawn to charge the amounts thereof against particular shipments of goods or merchandise, do not, according to my experience of the custom of merchants, understand therefrom that they obtain any lien or charge on those particular shipments, but only that the bills are regular, and are actually drawn against shipments, and are not accommodation bills, and that it is the custom of merchants when buying bills of exchange, if they desire to have a lien or charge on the goods shipped, against which such bills are drawn, to require to have delivered to them the bills of lading, and other shipping documents relating to those goods, and, according to my experience and knowledge of the usages of trade, it is well understood by merchants that without the bills of lading they do not obtain any lien or charge upon the goods, to which such bills refer, or the proceeds of the sale thereof."

The action came on for trial before Mr. Justice *Chitty* on the 24th of April, 1884.

Rigby, Q.C., and *Carson*, for the Plaintiffs.

Romer, Q.C., and *Stallard*, for the Defendant *Kough*.

Robinson, Q.C., and *Yate Lee*, for the Defendant *Tappan*.

1884. May 19. CHITTY, J.:—

This case has occupied a considerable time, and chiefly by reason of the state or the supposed state of the authorities, but it appears to me to be really a very simple one.

The Plaintiffs are the holders of certain bills of exchange that were drawn by *Baxter & Co.* of *New York* upon Messrs. *Jones &*

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Co. their correspondents in *London*, and the Plaintiffs claim to have an equitable charge on the proceeds of certain cargoes that were consigned by *Baxter & Co.* to *Jones & Co.* at the time when the bills were drawn. The property in the goods undoubtedly at the time of these transactions was in *Baxter & Co.*, and undoubtedly it was competent for *Baxter & Co.* to create a valid charge or lien on the goods. As I say, the Plaintiffs claim to be equitable assigns.

The other parties to the action are the Defendant *Tappan*, who is the assignee of *Baxter & Co.* the consignors, the owners of the cargo subject to the questions which will have to be decided in this action, and the drawers of the bill, and the other Defendant is Mr. *Kough* who represents the house of *Jones & Co.* in *London*, the consignee of the cargo and the drawee of the bills. After the bills had been bought by the Plaintiffs in *New York*, *Baxter & Co.* became bankrupt, and notice of their bankruptcy reached the Defendant *Kough* before either of the bills or the goods came forward or were received by him, and he declined to accept either bill of exchange which was afterwards presented to him in due course.

Now the Plaintiffs claiming an equitable charge must found their case upon agreement. An agreement to pay out of the fund is a good equitable charge. It matters not whether it be to pay an existing debt, or a sum of money advanced at the time, or whether it be a bill of exchange, but it must be shewn on the part of those who assert an equitable charge that they have obtained it by agreement. The agreement may be shewn by producing a written document which is clear, or the agreement may be fairly derived from the course of dealing, and, where there is a contest as to an oral agreement, the Court must decide whether there is such an oral agreement or not, and the Plaintiffs have to make out in this case one or other of the things I have mentioned, before they can succeed in establishing an agreement amounting to an equitable charge or an equitable assignment of part of the fund. An agreement may be shewn by the terms which the parties came to with reference to the supposed course of dealing, and derived also from the course of dealing itself relating to transactions that have been entered into or trans-

actions which it is proposed should be entered into, or it may be shewn by the special terms agreed upon at the time when the transaction takes place. In regard to the question whether there was any special agreement at the time when the bills were bought by the Plaintiffs, the case stands clear of all difficulty whatever. There was no special agreement entered into at the time when the Plaintiffs bought the bills. They bought them in the ordinary way—on the market; and therefore they are thrown back upon some terms which are alleged by them to have been arranged on a previous occasion, and to have been intended to govern the course of dealing in regard to the purchase of the bills throughout the transactions that might thereafter ensue.

Now, have they shewn any such agreement as that? The evidence on the part of the Plaintiffs is contained in the 3rd paragraph of Mr. *Johnson's* affidavit. [His Lordship read the paragraph above set out, and continued:—]

That statement amounts to neither more nor less than this: that in entering into this transaction with regard to the purchasing of Mr. *Baxter's* drafts by or on behalf of the Plaintiffs the Plaintiffs were assured that the bills were good mercantile bills, that they were not accommodation bills, but that they were actually drawn against shipments specified in advices; in other words that they were regular bills drawn in the ordinary course of a proper mercantile transaction. There is not one word there, which shews that the parties who were to buy the bills should have a charge on the proceeds, and indeed I think it appears from the rest of the evidence that such a thing had not entered into the minds of the parties at all. The other evidence which has been referred to is that of Mr. *Baxter* who has made an affidavit on behalf of his assignee in bankruptcy. He says this in paragraph 2. [His Lordship read the paragraph set out above, and continued:—] It appears to me that the ingenious counsel for the Plaintiffs have endeavoured to attribute a wrong meaning to the affidavit of Mr. *Baxter*. Mr. *Baxter* only says, "the merchandise out of the proceeds of which they" (the bills) "were expected to be paid." It always is the common expectation when mercantile bills are drawn in an honest transaction and as against goods that the bills will be met out of the proceeds of sale. To

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say that these words meant, as was contended by the counsel for the Plaintiffs, that there was to be a charge, appears to me to be an attempt to put an erroneous interpretation upon the language of the witness. He says, "expected to be paid." He has not been cross-examined. I think it would be wrong to say that such an expression as that meant that there was an agreement that they would be paid, and that the bills in each case would form a specific charge upon the specific goods, or the proceeds of the goods. The Plaintiffs have failed to prove any special agreement relating to the particular transaction, or any agreement derived from the course of dealing as between the drawers and sellers of the bills, and the purchasers of the bills. The course of dealing between the consignors and consignees was this: The consignees, *Jones & Brothers*, were under no obligation to accept the bills. The goods and cargoes which they were receiving were more or less of a perishable nature, and they, before they accepted any particular bill, considered what the cargo was, and accepted the bill when they thought that the cargo would form a sufficient security; but they did not rely on the particular cargo which was coming forward, because the course of business was this, that the proceeds of the sales of the various cargoes of which they were in course of receipt were carried to a general account, and when they accepted the bills they had the security of the general account, that is to say, the proceeds of the various cargoes then either undisposed of or in course of being disposed of as a security, out of which they could have repaid themselves the amount of acceptances. The course of dealing as between the consignors and consignees, if it be looked to with a view to assist the Plaintiffs, so far from being favourable to them, is adverse to them.

Now I propose to say a few words on the particular documents on which great reliance was placed in the opening of the case. I take it now to be settled law that a mere reference on the face of the bill to a cargo, shewing that the bill is drawn (to use a term in mercantile language) as against the cargo, does not create any charge in favour of the bill holder as against the cargo or the proceeds of the cargo. There are various forms which have been used in the reported cases, but they all are reducible to what I have stated, that a mere reference on the face of the bill of

exchange to the cargo, shewing that it is drawn against cargoes, or the like, is insufficient to create any lien. Lord Justice *Mellish* says in *Robey & Co's. Perseverance Ironworks* v. *Ollier* (1): "The indorsement of a bill gives only a right to the bill, and I do not think that any mercantile man would suppose, because he saw in the bill the words 'which place to account cargo per *A.*' that he was to have a lien on that cargo," and in *Ex parte Arbuthnot* (2), the bill on the face of it referred to the cargo, the words being, "and place the same to account cotton shipments as advised with or without further advice." In the case before me the bills of exchange do contain such an intimation. In the first bill, the one for £2500, the words are, "and charge the same to account of cheese per *Britannic*, and lard per *Greece*," with the words "as advised," and on the same day a letter of advice was sent by the drawers of the bill to the consignee of the cargo, that is to say, by *Baxter & Co.* to *Jones Brothers*, containing these words: "We inclose bill of lading for 1558 boxes per *Britannic*, and against these and lard per *Greece*, we value on you at sixty days' sight for £2500." The second bill of exchange refers to a cargo in the same way as the first, with this exception, that it does not contain the words "as advised," and the letter of advice is in similar terms to the letter which I have already read.

Now, the Plaintiffs undoubtedly started this case on a footing, very different from that which they have been able to maintain after the evidence that has been gone into. It is stated in the 9th paragraph of the statement of claim that there was a distinct communication to them of the letters of advice before they bought the bills, and there is a statement that the Plaintiffs "purchased the bills on the faith of the letters, and in the belief that by the said bills and letters the said consignments and the proceeds of sale thereof were specifically appropriated to meet the said bills," but when the evidence is examined, it is admitted that there is not one tittle of evidence to support that statement beyond such evidence as is found on the face of the bills themselves.

Counsel for the Plaintiffs attempted to give great force to the words "as advised" in the first bill, knowing that, when they did that, to a certain extent they were weakening their case upon the

(1) Law Rep. 7 Ch. 695, 699. (2) 3 Ch. D. 477.

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second bill. It appears to me that the words "as advised," having regard to the circumstances of this case, make no difference whatever. If there had been a contest between the parties, as to whether the letters of advice had been communicated, or not, the insertion of those words upon the face of the bill might have been material; but I am asked to take the words "as advised" and to draw the inference from them, that there was a specific agreement with reference to creating a charge on the cargo in the face of the facts which are proved. I have all the facts before me as to what did take place, and upon those facts I say unhesitatingly that there is no ground for the suggestion that there was any specific agreement entered into at the time. The words "as advised" were put in without any reason, and without any intention on the part of the person who inserted them on the face of the bill to refer to any particular agreement. That the words "as advised" were thrown in without any special ground is to my mind clear; and it is acknowledged that there is no distinction between the cases arising on the bill of the 5th of August and the case arising on the bill of the 6th of August, and on the face of the bill of the 6th of August there are no such words. These are words thrown in which to my mind have no special meaning, and I decline to infer from the words "as advised" that there was an agreement when I am satisfied in point of fact that there was none.

The letters of advice, as I have said, were sent by the consignors to the consignee, but if there was no agreement binding the consignors and creating as against them an equitable obligation to allow the proceeds of the goods to be applied in payment of the bills, the letters of advice amount to this and this only—instructions by the principal to the agent, which of course would be, (unless they had been embodied in an agreement, and I think they were not, between the principal and the purchaser of the bill) mere instructions by a principal to an agent, and would be revocable at will; and in the case before me such instructions would of course be revoked by the bankruptcy which intervened a day or two after the letters of advice were sent, because as the bankruptcy intervened the property in the goods was changed and *Baxter & Co.* were no longer owners of the goods, but the

assignee in bankruptcy became the owner in their place. It appears to me from what I have stated that this case is really free from any substantial difficulty, but I bear this in mind, that I am not deciding as between the Defendants, who are entitled to see whether *Jones & Co.* have not by reason of some general lien which they claim a right to have the goods applied to discharge their general debt. With that I am not concerned. The only parties who are contesting the matter before me are the Plaintiffs who claim the charge, and, for the purposes of this action, the Defendants, representing the assignee in bankruptcy of *Baxter & Co.*, and Mr. *Kough* representing his firm of *Jones & Co.*, are combined in opposing the claim of the Plaintiffs. Of course their combination neither makes the case for the Plaintiffs better nor worse.

Now, after what I have stated, I really consider it unnecessary to go through the cases at any length, and I do not propose to do so. The case of *Frith* v. *Forbes* (1) is that which is mainly relied upon by the Plaintiffs. It is a case which appears to have been misunderstood. I say that because Lord Justice *James* (from whom irrelevant statements seldom fell) says it is a case which must not be misunderstood, and he has given at least one explanation of it in *Ex parte Arbuthnot* (2). He there says: "The case of *Frith* v. *Forbes* must not be misunderstood. The Court there held, that in a transaction between principal and agent, a direction given by the principal to the agent as to the application of the proceeds of the sale of particular goods, was binding on the agent, and that he could not set up against it his own general lien." Lord Justice *Baggallay*, referring to what had fallen from Lord Justice *James* on a former occasion, adopted in fact what Lord Justice *James* had said. Possibly he put it a little stronger than it would appear Lord Justice *James* himself did, but no doubt he was satisfied as to what Lord Justice *James* meant, having heard what had fallen from him during the course of the argument before them. He says, quoting Lord Justice *James* with approval, "In *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (3) *Frith* v. *Forbes* was commented upon, and the Lord Justice *James* then said that the decision in that case depended

(1) 4 D. F. & J. 409. (2) 3 Ch. D. 477, 480. (3) Law Rep. 7 Ch. 690.

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upon special circumstances, and could not be treated as governing any other case."

I will make one other observation upon *Frith* v. *Forbes* (1), which is this, that *Begbie & Co.* were not parties contesting the matter in the Court of Appeal; and it does sometimes happen that the rights of parties who do not appear to argue their case are overlooked by the Court. There is ground for saying, having regard to a passage in the judgment of the Lord Justice *Knight Bruce* at p. 418 of the report, that there are some facts which were adverse to *Begbie & Co.*, which do not appear upon the face of the report, and which may have constituted sufficient ground why *Begbie & Co.* should not have argued it. The passage I refer to is that which shews that there were letters from the assignees in bankruptcy of *Begbie & Co.*, which letters the Lord Justice considered had a material bearing upon the question.

The case of *Frith* v. *Forbes* was a decision between the holders of the bills and the Defendant *Forbes*, who had taken cargoes without having accepted the bills, and the circumstances, no doubt, were very special. It is not for me to say that the particular case was wrongly decided, I am quite satisfied to say that it is a decision which cannot be treated as an authority as binding me, in any way, in this case.

I think it unnecessary to go through the other decisions, because I have stated the ground upon which I proceed on principle.

It appears to me, for the reasons I have given, the Plaintiffs' case fails as against the Defendants, and therefore the action must in such a case as this be dismissed.

I have not referred in detail to the telegrams and letters which came from the Plaintiffs immediately after they had notice of the bankruptcy. I may say that those letters could not be used in favour of the Plaintiffs to shew that there was any equitable charge; and it is not unsatisfactory to know that in the earlier letters and telegrams it did not appear to them, as mercantile men, that they had any charge.

C. A. From this judgment the Plaintiffs appealed. The appeal came on for hearing on the 19th of May, 1885.

(1) 4 D. F. & J. 409.

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Rigby, Q.C., and *Carson*, for the Appellants:—

The direction on the bill of exchange constitutes a charge in favour of the Plaintiffs. There is here all that is required to make a good equitable assignment—viz., a direction by the owner of goods in the hands of an agent to that agent to pay thereout to a third party for valuable consideration, and that direction remaining unrevoked, was communicated to the agent on presentation of the bill to him: *Burn* v. *Carvalho* (1).

The evidence as to the dealings between the Plaintiffs and *Baxter* in *America* prior to the purchase of the bills by the Plaintiffs proves such a case as Lord *Selborne* in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (2) says, would, if proved there, have been a clear case of a contract for an equitable assignment. The bill, drawn in the form it was, amounts to a representation: We are remitting goods to the drawee—if the bills are accepted you will be paid by the acceptors, if they are not, you will have a charge on the goods mentioned in the bills—and on that representation the Plaintiffs act. The drawee cannot accept the goods without accepting the bills: *Shepherd* v. *Harrison* (3); and, if he does not accept the bills, it cannot be that the drawer can, after receiving the Plaintiffs' money, recover the goods, discharged from liability on the bill.

But if there be no equitable assignment to the Plaintiffs, the letter of advice constitutes a specific appropriation as between consignor and consignee in favour of the consignor, and the benefit of that appropriation has been transferred to the Plaintiffs within the doctrine of *Frith* v. *Forbes* (4). The present is on all fours with that case—the parties to the action are the same (5), the documents, viz., the bills and letters of advice, are for all practical purposes identical, and the Court cannot decide against the contention of the Appellants without expressly overruling that decision, which has stood for over twenty years, and which,

(1) 4 My. & Cr. 690.
(2) Law Rep. 6 H. L. 352, 359.
(3) Ibid. 5 H. L. 116.
(4) 4 D. F. & J. 409.
(5) It appears from the bill in that action that the assignees in bankruptcy of *Begbie & Co.* (occupying the position of *Tappan* in this case) were defendants, and from other reports of the case that they were represented not only in the Court below, but also on the appeal: see 32 L. J. (Ch.) 10; 10 W. R. 658.

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as being a decision of a Court of co-ordinate authority, is binding in this Court in any case where the circumstances, as here, are the same.

The reason why the decision has not been followed is that attempts have been made to apply it for purposes alien to its true principle; but nowhere has any Judge said that, upon its particular facts, it was wrong.

In *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (1) the consignor and drawer of the bill was not owner of the goods, but had only a joint interest with the consignee, and the bills were drawn, not in favour of a named third person, but to the drawer's own order. Lord Justice *James* expressed no disapproval of the decision as a decision upon what he treated as its real grounds, and the remarks of Lord Justice *Mellish* are only to the effect that the indorsement of a bill is not an assignment of any collateral security held by the indorser.

In *Ex parte Arbuthnot* (2) the Court said that the case had been misunderstood, and was not applicable where, as in that case, the consignee became upon accepting the bills the absolute owner; so in *Ex parte Dever* (3), the Court relied on the form of the letter of credit, which had been shewn to the discounter, as shewing that on acceptance the bills of lading, which had been annexed to the bills, were to be surrendered to the acceptors, that is, as Lord Justice *Cotton* said (4), free from the lien of the bill holder.

In *Phelps, Stokes, & Co.* v. *Comber* (5) the consignments were made to one man and the bill drawn on another. Here, as in *Frith* v. *Forbes* (6), the drawee and consignee is one and the same person.

Frith v. *Forbes* never having been overruled must govern this case; the letters of advice created a specific appropriation in favour of *Baxter & Co.*, and the bills of exchange referring to the consignments operate as orders to *Kough* to pay the bills out of the consignments, and that order is communicated to *Kough* on presentation of the bills to him.

(1) Law Rep. 7 Ch. 695.
(2) 3 Ch. D. 477.
(3) 13 Q. B. D. 766.
(4) 13 Q. B. D. 776.
(5) *Ante*, p. 813.
(6) 4 D. F. & J. 409.

It now turns out that *Begbie & Co.* were represented, and the rights of the Plaintiffs as against them, as well as against *Forbes & Co.*, were adjudicated upon; Lord Justice *Knight Bruce*, on p. 418, asking whether the Plaintiffs had "as against *Begbie* and their estate and against *Forbes & Co.*," the charge claimed.

Ranken v. *Alfaro* (1), *Ex parte South* (2), and *Ex parte Carruthers* (3), were also referred to.

Romer, Q.C., and *Stallard*, for *Kough*:—

Frith v. *Forbes* (4), if it is to be considered as laying down any general principle of law, and not as applied to the particular circumstances, is erroneous, and we ask the Court to overrule it. There may have been some special circumstances not mentioned in the report, and it may have been that there was the regular practice to specifically appropriate the goods, whereas here it is clear upon the undisputed evidence of the Defendant that there was no such course of dealing as between *Baxter & Co.* and *Kough*.

They were stopped by the Court.

Robinson, Q.C., and *Yate Lee*, for *Tappan*, were not called upon.

Carson, in reply:—

The Judges in *Frith* v. *Forbes* expressly refer to the facts and to the documents on which they relied in giving judgment. They placed upon those facts and documents a certain legal conclusion, and deduced legal consequences.

COTTON, L.J.:—

This is an appeal against the judgment of Mr. Justice *Chitty*, by which he decided that the Plaintiffs, who are purchasers in *New York* of bills drawn on *Jones & Co.*, have no specific charge or lien on the proceeds of goods remitted to that firm in *England*.

These bills are in a form not at all unusual; that is, though they are bills of exchange, yet they contain a reference to certain proceeds of certain cargoes against which the bills were to be

(1) 5 Ch. D. 786.
(2) 3 Sw. 392.
(3) 3 De G. & Sm. 570.
(4) 4 D. F. & J. 409.

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charged. [His Lordship read the two bills, and continued:—] Then, there are in one, and not in another, the words "is advised."

The Appellants do not rely upon that as in itself giving them a charge, but they look to the words "as advised" on the face of one of the bills of exchange, not expressed in the other, and what they say is this—that the letter of advice which went to the English firm, *Jones Brothers*, before they received these goods, did appropriate in favour of the drawers of the bills, and consignors of the goods, the proceeds of these goods, so as to make them specifically appropriated to meet the particular bills, which they had drawn, and which they expected to be accepted by the English firm.

In this case *Jones Brothers* in fact never accepted the bills, and in that state of circumstances we think (we have not now to decide it) that, unless there is something exceptional in the case, those who receive consignments with such letters as these are bound, if they receive the consignments, to accept the bills of exchange; that is to say, having regard to the terms of the letter, the goods are sent to them with the implied, if not an expressed, condition that they are to receive them only if they will undertake the obligation imposed upon them, by accepting the bills, and if they do not accept the bills the goods will be returned either to the consignor or to any one who, from the consignor, may have acquired a good charge upon, or an assignment of, the goods. We have not to decide that, because the trustee in bankruptcy of Messrs. *Baxter & Co.* and Messrs. *Jones & Co.* are co-Respondents to this appeal and co-Defendants to the action, but in the absence of special circumstances I think that this proposition would not be disputed.

But the Appellants require something far beyond this. They say that, even though there was no acceptance, yet the proceeds of these goods would be specifically appropriated for the benefit of *Baxter & Co.*, and then they go on to say that they are assigns of the right of *Baxter & Co.*

I am dealing now with the first question, whether there was any right in *Baxter & Co.* to say that that specific appropriation existed. The words of the letter referring to this are these: "We

inclose bill of lading for 1558 boxes per *Britannic*," it is quite sufficient to read that. "And against these and lard per *Greece* we value on you at sixty days' sight for £2500 favour *Brown, Shipley, & Co.*"

We have really no evidence as to what, according to mercantile usage, is the effect, as between consignor and consignee, of such an advice as this. In my opinion, if we deal with this independently of mercantile usage, it is this: here we have a firm in *America* drawing on a firm in *England*, and what they say is this, "We have drawn on you, we have sent you a remittance which will be sufficient to indemnify you against any liability which you will undertake by reason of your acceptances—that is to say—we are sending goods, the proceeds of which will come into the general account between us, as against the bill of exchange when you have accepted it, and when you pay it." And that is really an inducement to the consignee, on whom the bill of exchange is drawn, to undertake the liability which he will incur by giving the acceptances.

That will not do for the Appellants. They must maintain that the proceeds of these goods are specifically appropriated, as well before as after acceptance given, in favour of the consignor, and appropriated only to the payment of the bills. It is remarkable that, although in this case evidence has been given, as to what would be the proper result of the words contained in the bills of exchange, no word is said in the evidence as to what would be the effect, according to mercantile usage, of the terms contained in these letters of advice, as regards the position of the consignor who has drawn against these consignments. In the absence of any such evidence it would, in my opinion, be wrong to attribute to these letters, and to this advice, any such result as is claimed on behalf of the Appellants.

Now it is said that, in deciding that there is no such appropriation in favour of the consignor, we should be deciding against the case of *Frith* v. *Forbes* (1). That is a case which has been constantly mentioned, but never, I think, followed in any other case. Possibly there has never been a case so much like *Frith* v. *Forbes* as the present; but we cannot disregard what has been said by

(1) 4 D. F. & J. 409.

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Lord Justice *James*, that *Frith* v. *Forbes* (1) "turned upon special circumstances, and can hardly be treated as governing any other case." Now if that case is to govern the present, the Lord Justice, when he said it turned on special circumstances, must really have spoken in disregard of what, I suppose, is a most common practice between merchants abroad and merchants in *England*, viz., that goods are remitted with a letter stating that they are remitted, and that certain bills have been drawn against them, and that the bills of exchange do also refer on their face to the consignments in the same way. He must have considered, that there was something special in the circumstances of that case shewing that there was an appropriation in favour of the consignor, and shewing that there was a transfer of that appropriation to the bill-holders, which we cannot gather distinctly from the report. But here we have evidence on behalf of both the parties, the consignor and consignee, shewing that the result of the dealings between them, in transactions similar to that now before us, was, that the goods and the proceeds, when acceptances had been given, were not considered as appropriated, but that they were carried to the general account. If they were carried to the general account that disposes of any idea of appropriation, because if there is to be an appropriation, the goods and the proceeds would be carried to an account which will shew that they are obtained simply for the purpose of paying these acceptances, and until the acceptances are paid the consignee has no right to them.

That evidence might have been met by shewing that, on looking at the accounts, these proceeds were so dealt with as to make it impossible for *Jones & Co.* to deny that there was any appropriation; that is to say, if it had been shewn that there was a separate account of these shipments, or if the money when received, even though carried into the general account, had been treated as money which still remained the money of the consignors, then the evidence would have been met. Here, as far as we can see, there is no such evidence at all. If it had appeared on the accounts, which have not been put in evidence, that on the moneys received from the proceeds of remittances interest had been credited to the American firm, it would have been impossible

(1) 4 D. F. & J. 409.

then to say that there had been a specific appropriation. If there had been any such appropriation, the money must have been held, and not employed by *Jones & Co.*, for their general purposes. Interest is paid for the use of money (1), but if the money was appropriated for the specific purpose of answering these bills, it is difficult to see how any interest could be credited on those proceeds to the consignors. We must take it, on the evidence, that in the dealings between the parties there was no appropriation at all.

Unfortunately we cannot find in the report of *Frith* v. *Forbes* (2) what was the ground on which the Judges decided that there was an appropriation in favour of the consignors. It may be that there were letters or circumstances which tended to support the Judges in that conclusion, and *Begbie & Co.* did not, in fact, dispute it, because although, as pointed out by Mr. *Carson*, it is evident that both below and in the Court of Appeal, *Begbie & Co.* were represented, yet they seem to have taken in neither Court any strong part in arguing against the rights of the bill-holders. If the Lords Justices did in that case lay down that a letter, such as this is, without anything more, constitutes an appropriation in favour of the consignor, so that the goods must be kept as a specifically appropriated fund in his favour, I should say they drew a conclusion which is not justified, and the sooner this Court says that, in my opinion the better. It may be that there was other evidence, but in my opinion it is not the correct conclusion, from letters of advice such as this is, that there was an appropriation in favour of the consignor, that the proceeds of the goods shall be kept as a specific fund appropriated for the payment of bills. That, in my opinion, would be a wrong conclusion, and as far as one can see (and this was pressed upon us by Mr. *Carson*), that was all the evidence that the Judges had in *Frith* v. *Forbes*.

There may be dealings between firms, consignors, and consignees, acting as these were, in transactions like these, which do shew that, whatever the terms of the letters were, there was a

(1) See *Ex parte Dever*, 14 Q. B. D. 611, and the cases there referred to, *Ex parte Gothenburg Commercial Co.*, 29 W. R. 358; *In re Broad*, 13 Q. B. D. 740.

(2) 4 D. F. & J. 409.

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contract for specific appropriation between them. They might, for instance, by appropriating the goods, and by passing accounts shewing that appropriation, shew that those were really the terms on which they carried on business, and on which they contracted one with the other, and then there would be no difficulty as regards appropriation. But here, in my opinion, simply on the letters there was no appropriation, and we have evidence here that the advices were not acted on as an appropriation, and that really disposes of the whole case. I may mention the case of *Inman* v. *Clare* (1) before Lord *Hatherley*, in which a question of appropriation was decided by a reference to a custom which existed in *Liverpool*. Merchants in *Liverpool* received the goods, and there was (which it is hardly necessary for me to inquire into here after the opinion I have given on the first part of the case) a clear transfer by letter to the holders of the bills of the right which the drawer and consignor had. But as regards the other part of the case it has hardly been contended that if these bills stood alone they would give a good charge. It was contended that, the letters of advice having effected the appropriation in favour of the consignors and drawers, the bills of themselves, by their terms, would be a transfer of the right of the drawer to the persons in whose favour those bills were drawn. Now it is hardly necessary to give an opinion upon that point, but in my opinion it would really be construing the terms of this document wrongly, to say that, if there were any such appropriation, that document transferred the benefit of that appropriation from the drawer of the bill to the person to whose order it was drawn. How can it be contended that there was any such transfer in the case of the second bill? In that bill the words "as advised," relied upon in the earlier bill, are omitted. Construing these bills fairly, they simply come to such a direction as this: "When your acceptances, which must be given if you take the goods, are paid, then as a matter of account treat the payment of those acceptances as exhausting any credit we may have obtained by our having remitted to you these particular goods."

In my opinion, the Appellants have failed on the essential part of their case, inasmuch as they have failed to shew that there is

(1) Joh. 769.

any appropriation, in favour of the drawers of the bills, of the cargo or of the proceeds of the cargo.

LINDLEY, L.J.:—

The Plaintiffs here are purchasers of certain bills of exchange drawn by *Archibald Baxter & Co.* upon *Jones Brothers, Jones Brothers* being represented by the Defendant *Kough.*

The bill of exchange runs in this way:—[His Lordship read the bill of the 5th of August, and continued:—]

Now the first question to which I will address myself is this: Did that bill of exchange, taken by itself, give the Plaintiffs any specific charge upon the goods, the cheese and the lard, therein referred to? I look at it quite apart from any question of appropriation between the consignor and the consignee, or of any transfer of the right to appropriation. I must say that I cannot find anything, either in *Frith* v. *Forbes* (1), or in the general law, or in the evidence which is adduced in this case, which goes that length; looking at the bill of exchange *per se*, apart from anything else, there is no language in it which amounts to anything of the sort; and when we bear in mind that the controversy in this case has arisen when the bill of exchange has not been accepted, we are asked to say, according to the argument, that this bill of exchange in itself gives *Brown, Shipley, & Co.* an equitable right in the goods which were consigned to the drawee of the bill, and which the consignee was to deal with when he had accepted the bill in the way here mentioned. I cannot find in this document any language whatever which gives the Plaintiffs any interest in the proceeds of the goods which were consigned by the drawer. I think it has been seen throughout that the case cannot be put upon the bill of exchange simply as a declaration of charge or a document of charge.

Then it is put very ingeniously in another way. It is said that, however that may be, there was here an appropriation by *Archibald Baxter & Co.*, the drawers of the bill and consignors of this cheese and lard, to meet that particular bill, that is to say, that *Archibald Baxter & Co.*, the drawers and the consignors, were entitled as

(1) 4 D. F. & J. 409.

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against *Jones Brothers* to have this bill taken up by these particular goods.

That is a question of inference of fact. Was there anything of the sort? There is the advice note, which runs in this way: "We inclose bill of lading for 1558 boxes per *Britannic*, and against these and lard per *Greece* we value on you at sixty days' sight for £2500 favour *Brown, Shipley, & Co.*"

Now there is the uncontradicted evidence of Mr. *Kough*, contained in the 16th paragraph of his affidavit, which shews that in point of fact these parties did not deal upon the footing of there being any specific appropriation such as is contended for. In the face of that evidence, and there being no distinct evidence to the contrary, I cannot draw the conclusion from the document and that evidence that there was any such specific appropriation. Of course I see this: it is not at present disputed that these goods were consigned to *Jones Brothers* as against these bills, or that the bills were drawn as against these goods, and as *Jones Brothers* did not choose to accept the bills they ought to return the goods. Of course that is plain enough, but any specific appropriation, such as is contended for, seems to me to be negatived by the evidence in the case.

If there was no specific appropriation as between the consignors and the consignee, of course there could be no transfer of the right to specific appropriation, and the case therefore fails on that ground. That is how it appears to me, I confess, the matter would stand, apart from authority and looking at the documents and the facts.

But then it is said we cannot so decide in this case without overruling *Frith* v. *Forbes* (1).

Now I confess I do not see any material distinction between this case and *Frith* v. *Forbes*, unless it be in the 16th paragraph of Mr. *Kough's* affidavit, which negatives any specific appropriation between drawer and acceptor. In *Frith* v. *Forbes* it is to be observed that there was no controversy between the consignor and the consignees. *Begbie & Co.* appear to have been before the Court of Appeal, represented by counsel, but it does not seem to have been argued, at any rate by them, that there was no

(1) 4 D. F. & J. 409.

specific appropriation; it seems rather to have been assumed, if not in the Court below, at all events in the Court of Appeal, that there was that appropriation. *Turner*, L.J., came to the conclusion, that there was an appropriation between the consignor and the consignees and acceptors, and he put it in this way (1): "Now in the letters written by *Begbie & Co.* to *Forbes & Co.* with reference to each of these bills, it is in terms expressed that the bills were drawn against the consignment, terms which, as I understand their import, could not be construed otherwise than as meaning that the bills were to be paid out of the proceeds of the consignments."

Now I do not know whether the Lord Justice there meant to say that in point of law those terms bore that meaning, or whether he meant to say that that was his inference of fact, but the words which he uses, are, as I understand that report, open to the observation that, having regard to the correspondence and the evidence in that case, and having regard to the line of conduct which *Begbie & Co.* took, he came to the conclusion as a matter of fact that those expressions bore that meaning. If that was all he meant of course there is nothing in it. He may be right or wrong, but we are not bound to draw the same inference. I see the difficulty there is in ascertaining exactly whether he did or did not mean to say that those two documents—the letter of advice and bill of exchange—amounted in point of law to a specific appropriation. If he did, I confess it seems to me to be rather startling, and not consistent with what I understand the law to be as decided in other cases, and the law upon which business is conducted in this country. I do not think he can have meant that. I think he must have meant, under the circumstances of the case present to his mind, to have come to the conclusion that there was in fact that appropriation which, be it observed, *Begbie & Co.* never denied at all. Then he also came to the conclusion that, if there was that appropriation as between the consignor and the consignee, the benefit of it was transferred to the holder of the bill. There is a difficulty about that: a difficulty which I need not face here, because, to my mind, this breaks down in the initial step. There is here no right to

(1) 4 D. F. & J. 421.

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appropriate or to transfer. But there is a difficulty in the second step in *Frith* v. *Forbes* (1) which it is impossible not to see, and I confess it is difficult to reconcile that with the other cases, and in particular with what Lord *Hatherley* said in *Inman* v. *Clare* (2), when he said distinctly that, if the drawer of the bill had the right of specific appropriation of the goods, he did not pass that by negotiating the bill.

It is put here by Mr. *Rigby* that there was a special bargain. That is dealt with in this particular case by cutting away the subject-matter of the bargain—if the consignor had no right to the appropriation, of course they could not bargain to give it to the Plaintiffs.

I have made these remarks on *Frith* v. *Forbes*, because it does appear to me to be extremely difficult to reconcile it with the principle of our decision. I do not see how to distinguish it, except by the passage in Mr. *Kough's* affidavit, which shews that there was no specific appropriation as there may have been in *Frith* v. *Forbes*.

Under these circumstances I think the view taken by Mr. Justice *Chitty* is right, and that the appeal ought to be dismissed.

FRY, L.J.:—

The question which we have to consider in this case arises upon a bill of exchange. There are two bills of exchange, but I will confine my observations to one—the bill of exchange of the 5th of August which has already been read by Lord Justice *Lindley*: there is a letter of the same date written by *Baxter & Co.* to Mr. *Kough*, in which they say, "We inclose bill of lading for 1558 boxes per *Britannic*, and against these and lard *per Greece*, we value on you at sixty days sight for £2500, favour *Brown, Shipley, & Co.*"

There are two arguments which have been adduced to us in this case, and which require to be taken separately. The first is, that the direction in the bill of exchange to "charge the same," that is, the £2500, "to account of cheese per *Britannic* and lard *per Greece* as advised," constitutes a lien or specific appropria-

(1) 4 D. F. & J. 409. (2) Joh. 769.

tion or charge in favour of Messrs. *Brown, Shipley, & Co.*, to whose orders the bill was drawn.

That is the point of view to which the evidence has been addressed, and it is a point of view which I understand Mr. *Rigby* to have by no means abandoned, but on the contrary to have pressed upon us, though Mr. *Carson* in the course of his very able argument to-day has preferred to press more strongly the second argument.

Now to my mind it is not correct to hold that those words of direction in the bill of exchange constituted any lien or any charge. Upon that point there is evidence before us of mercantile men with regard to the meaning and effect of such words in a bill of exchange, and although the evidence is not harmonious, the view which I conceive to be the true one is expressed by several witnesses, one of whom is Mr. *Bowring*, and I will read from his affidavit a passage which, according to my view, expresses the true conclusion of the effect of such an instrument. [His Lordship read the paragraph of his affidavit set out above and proceeded :—]

Furthermore I may observe that what passed between the firms of *Brown, Shipley, & Co.*, and *Baxter & Co.* in *America* with reference to the drawing of the series of bills of which these are part appears to me to confirm my conclusion as to the mercantile usage. I think that all *Brown, Shipley, & Co.* were anxious for, was to be satisfied that the bills of exchange, which they were about to purchase, were real mercantile bills and not accommodation bills.

The same point drew some observations from Lord Justice *Mellish* in the case of *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (1), which has been so often referred to in the course of this discussion. He said: "the indorsement of a bill gives only a right to the bill, and I do not think that any mercantile man would suppose, because he saw in the bill the words 'which place to account cargo per *A.*' that he was to have a lien on that cargo. A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed; if there is no bill of lading annexed, he only expects to get the security of the bill itself."

(1) Law Rep. 7 Ch. 699.

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That is my view of the true effect of that direction in the bill, and I think that, whether I look at the preceding cases, or at the evidence in this case, that conclusion is supported.

The second argument, which is the one which Mr. *Carson* especially pressed upon us, arises from that direction coupled with the letter of advice of the same date; and the way in which Mr. *Carson* has put it before us is this. He has said that the letter of advice creates a lien in favour of the maker of the bill, and that, by the direction on the face of the bill, that lien is transferred to the person to whose order the bill is drawn.

The first inquiry therefore is this. Does the letter of advice in this case create any specific appropriation in favour of the maker of the bill?

I have already read the words of the advice, "We inclose bill of lading" describing what it is for, "and against these and lard *per Greece*, we value on you at sixty days' sight for" so much. In other words, it really amounts to this: "We send certain bills of lading and" (to use the mercantile expression) "value on you at sight" for a certain amount. In my judgment the statement that they are sending the bills of lading, and that they are valuing for that amount, is merely a statement of the motive which they suggest to the drawee, why he should accept the bills, and no doubt he cannot refuse to accept the bills and at the same time take the bills of lading, and therefore as between the drawer and the drawee it imposes a condition on the acceptance of the goods. But I think that it goes no further, and I do not think that such language has in mercantile law the effect of creating any specific appropriation.

Now it is not a little worthy of observation that, in the present case, so little do the Appellants appear to have thought of this part of their present contention, that there is no evidence of mercantile men addressed to it, although it is one upon which the evidence of mercantile law would have been as relevant, as evidence giving the meaning of the direction in the bill of exchange. But, further, in the present case there is distinct evidence to shew that there was in fact no specific appropriation of these goods, and although this mode of drawing the bills of exchange, and this method of advising how they had been drawn

had been in force between the parties to this transaction for some considerable time previously, there had been no specific appropriation made of the cargoes to meet the bills of exchange.

The Lords Justices who have preceded me have dealt with that part of the case so fully that it is not necessary for me to do more than to say that I have on that evidence come to the same conclusion at which they have arrived. I think, therefore, whether we look at the course of dealing, or the language of the letter of advice, that neither was adequate to create a specific appropriation in favour of the maker of the bill.

But even supposing that it had been, I am bound to say that I feel great difficulty in the second step of the argument, which is this, that the direction contained in the bills of exchange had assigned or transferred the specific appropriation from the maker of the bills to the person to whose order they were drawn. I am unable to think that these words of direction have any such operation. Those words of direction appear to me to be merely what they purport to be—a direction as to the account against which the bills are to be placed, I do not think they are intended to transfer any lien, supposing it existed. Nor can I help observing that there would, to my mind, be very considerable difficulty in holding, that an instrument at the same moment operated as a bill of exchange and as an equitable assignment. I agree that it is not necessary to express any concluded opinion upon the point, and I therefore abstain from so doing. But it would require some argument to convince me that the same instrument could have that double operation, because difficult questions would arise. A bill of exchange is a negotiable instrument, taken in the ordinary course of business, free from the equities between the original parties to the transaction. An equitable assignment is not a negotiable instrument, and need not at all be free from the equities between the parties. If the same instrument creates the one and the other, does the equitable assignment travel to the hand of every holder of the bill of exchange? or if not, where does it stop? If it travels into the hands of all the holders of the bill, is it like a bill of exchange free from equities, or is it like an ordinary equitable assignment? Those are questions which appear to me worthy of consideration,

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and would have to be considered, before the Court would say that this instrument operates in both ways.

The argument no doubt has been mainly based, and very justly so, on the case of *Frith* v. *Forbes* (1), and Mr. *Carson* has pressed upon us very forcibly the importance of not departing from legal authorities. I feel the full weight of that observation. At the same time it must be borne in mind that cases are authorities for the principles of law, and not for conclusions of fact; and, as has already been pointed out by Lord Justice *Lindley*, it may well be that the true construction of that case is, that the Lords Justices, upon the facts then before them, came to the particular conclusion of fact with regard to the existence of the specific appropriation, and the transfer of it to the bill-holder. If they had intended to lay down any general principles that case could not have been dealt with as it has been by the Courts subsequently. The observation of Lord Justice *James*, which has been cited, that that case probably governed no other, is a very appropriate observation if in *Frith* v. *Forbes* the decision is a decision on an issue of fact; it was not an observation likely to have fallen from the Lord Justice if *Frith* v. *Forbes* laid down a principle of law.

I think, therefore, that we are not constrained by that case to come to any particular conclusion on the facts of this case, and that Mr. Justice *Chitty* was right in the conclusion he arrived at. The appeal therefore will be dismissed in the usual course with costs.

Solicitors for Appellants: *Paine, Son, & Pollock.*

Solicitors for Respondents: *Hill, Son, & Rickards; G. L. P. Eyre & Co.*

M. W.

(1) 4 D. F. & J. 409.

In re TRADE-MARK "ALPINE."

CHITTY, J.
1885
May 15, 22.

Patents, Designs and Trade-marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *sub-s.* (1) (*c*)—*Fancy Word—Trade-mark.*

The word "*Alpine*," and words of such class, although words in common use and not strictly fancy words, may, when applied to articles such as woollen and cotton goods, be registered as a trade-mark, as they are, if not "fancy words," at least fanciful words when applied to such goods, and so fall within sect. 64, sub-sect. (1) (*c*), of the *Patents, Designs and Trade-marks Act*, 1883 (46 & 47 Vict. c. 57).

In the month of January, 1885, Messrs. *Stapley & Co.* applied to the Registrar of Trade-marks to register the word "*Alpine*" in class 25 for cotton embroidery, and on the 4th of February following the Registrar informed the applicants that their application would be proceeded with provided they would prefix the word "*The*" to the word "*Alpine*," so that the words might read "*The Alpine*," on the ground that the word "*Alpine*" was an ordinary dictionary word, and that the prefixing of the article "*The*" would give it a special character in connection with the particular business for which it was sought to be registered, which would enable the combination to be accepted as "fancy words" within the meaning of sect. 64, sub-s. (1) (*c*) of the *Patents, Designs and Trade-marks Act*, 1883.

The matter came before the Comptroller under rule 17 of the Trade-marks Rules, 1883, on the 9th of March, 1885, when he informed the applicants that he was unable to proceed with the application unless the article "*The*" were prefixed to the word "*Alpine*."

This was a motion on behalf of the applicants that directions might be given to the Comptroller to proceed with the application No. 42,415, for registration of the word "*Alpine*" in class 25 in respect of cotton embroidery, notwithstanding, and by way of appeal from, his refusal so to do of the 9th of March, 1885, unless the article "*The*" were prefixed to the said word.

Romer, Q.C., and *Carpmael*, in support of the motion :—

The word "*Alpine*" used in connection with cotton embroidery is a "fancy word not in common use" within the meaning of

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sect. 64, sub-sect. (1) (*c*) of the *Patents, Designs and Trade-marks Act*, 1883, but if it is not a "fancy word" the addition of the article "*The*" cannot convert it into a fancy word.

The Comptroller has no power under the Act to require the addition of the word "*The*" to the fancy word sought to be registered.

The words, "*The Alpine*," if used in connection with cotton embroidery, would constitute the name of the article, and are not therefore capable of being registered as a trade-mark.

It is said by the other side that a word known to the English language cannot be registered as a trade-mark, but that it must be "a fancy word not in common use," but we say that "not in common use" must mean not in common use in connection with goods to which it is sought to be applied, such as the word "*Ethiopian*" when applied to black stockings.

Stirling, for the Board of Trade:—

The word "*Alpine*" is a common dictionary word, and not a "fancy word," and, therefore, does not fall within sect. 64 of the *Patents, Designs and Trade-marks Act*, 1883, which is distinct on the point that if a word is used as a trade-mark it must be a "fancy word not in common use."

Romer, in reply:—

It is sufficient compliance with the Act if the word sought to be registered is fanciful when applied to the class of goods in respect of which the registration is sought. The prefixing the definite article to the word "*Alpine*" might produce the impression on the public that "*The Alpine*" is the name of the goods themselves rather than the mark to denote that the goods are of our manufacture.

CHITTY, J.:—

The Appellants seek to register the word "*Alpine*" as a trade-mark in class 25, in respect of cotton embroidery. The Comptroller was willing when the matter was before him to register the word if the Appellant would consent to prefix the definite article "*The*" before *Alpine*. This was the only question then raised. The question turns upon the 64th section of the

Act of 1883, sub-sect. (1) (*c*), which permits the registration of "fancy word or words not in common use." The mark is a new mark, that is to say a mark not used as a trade-mark before the 13th of August, 1875. I am unable to find any substantial distinction between "*Alpine*" and "*The Alpine*" in reference to the class of goods in respect of which registration is sought. If the word "*Alpine*" is not a fancy word within the section, I do not see how it becomes a fancy word by prefixing the definite article, indeed I think that the contention of the applicants has some foundation, when they say that the prefixing of the definite article is calculated to produce the impression on the public mind that "*The Alpine*" is the name or designation of the goods themselves, rather than the mark to denote that the goods are of their manufacture.

But on the argument before me Mr. *Stirling*, who appears for the Comptroller and for the Board of Trade, who have referred the matter to the decision of this Court, has raised a question of general importance on the construction of the sub-section above quoted. He contends that the word "*Alpine*," whether with or without the definite article, is not capable of being registered. The question is whether, where it is proposed to register a word, the word itself must not be a fancy word, or whether it is not sufficient that the use or application of the word should be fanciful in reference to the class of goods in respect of which the registration is sought. The enactment so far as I have stated it, is new. Under the Act of 1875 it was not competent to register a fancy word in the strictest sense of the term, that is, even where the word itself was a newly invented or fanciful word. That was decided by the late Master of the Rolls in *Ex parte Stephens* (1), where he refused to allow the registration of the word "*AEILYTON*" in reference to ink—that was a newly coined word derived from a Greek source slightly changed.

Before the passing of the Acts for the registration of trade-marks it was competent for a trader to acquire a trade-mark entitled to protection not merely in a new word, but in a word newly or fancifully applied. Examples of both classes are given in Mr. *Sebastian's* excellent treatise on Trade-marks, particularly at

(1) 3 Ch. D. 659.

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pages 57 and 58. It would appear that the instances of the former class are comparatively rare, while those of the second class are numerous, "*Anatolia*" in reference to liquorice, "*Turin*" in reference to cloth, and "*Glenfield*" in reference to starch, are examples of the latter class which are similar to the case before me. There can be no question that the decision of the late Master of the Rolls in *Ex parte Stephens* (1) was right on the true construction of the statute of 1875. But it caused great inconvenience to the trade, and it is clear that the enactment above cited was passed as a remedy. The question is whether the Legislature intended by the enactment merely to overrule that decision, or to take a wider scope by permitting the registration as new marks of words which in their fanciful application would have been entitled to protection as the law stood before the Registration Acts were passed. Very little assistance is afforded by the other parts of the Act. The proviso at the end of the 64th section permits the registration of any old trade-mark which was in use before the 13th of August, 1875, consisting of "any special and distinctive word or words." The 74th section of the Act of 1883 permits the entry on the register as an addition to a trade-mark of any distinctive word or words, although common to the trade, subject to the disclaimer by the applicant of any right to the exclusive use of the same, and it gives the sanction of the Legislature to the rule previously adopted by the Court, that user by more than three persons is a user common to the trade. The question is not one of grammar or of literary invention or literary precision, but of trade. The English trader is generally too much occupied with his business to devote much time to the invention of new or fancy words, and he is not always gifted with that degree of fancy which is capable of coining new words. Besides the English public is not so ready, apparently, to buy articles passing under an entirely new name, which may give rise to a suspicion of adulteration. In *America* there appears to be a greater liking for new names and novel articles (2). In trade, what difference is there between the employment of a word entirely new and fanciful such as "*Opoponax*," or of a word to be found in the existing dictionaries which has no relation other than merely a fanciful one to the goods put on the market, such for instance

(1) 3 Ch. D. 659.

(2) Seb. Trade-marks, p. 57.

as "*Wizard*" in reference to oil. It requires a somewhat greater power of invention to bring out an entirely new word than to apply an old or existing word in a new and fanciful sense. It does not seem reasonable to presume that the Legislature meant to tax the trader's powers of invention in this direction. Where the use of a word not unknown at the time of its first employment is quite different from its ordinary use and application, so different that it is seen at the first glance that the word is being used quite out of its common signification, where its application to the goods is so novel and striking as to be the creation of fancy, it appears to me that it serves as a mark to distinguish the goods as being the production of a particular manufacturer, just as well, in all respects, as when the word itself is fanciful. The words "in common use" shew that the enactment was addressed in some measure to the use or application of the word. If the term "fancy word" denoted merely a word newly invented it would have been unnecessary, and, indeed, inconsistent to add "not in common use." It appears from the statement of Mr. *Stirling* at the Bar that if I accede to his argument I should be overruling the practice which has been adopted in the office since the passing of the Act of 1883, and upsetting a large number of trade-marks which have been permitted to be registered without question. This practice has prevailed for more than a year, and although the practice cannot be judicially regarded as an authoritative exposition of the Act of Parliament, I think I may attribute some weight to it in the consideration of the question. It shews at least the view which has been taken of the enactment and acted upon by practical men in the trade and by the Comptroller. The word "*Alpine*" is not of itself a fancy word, but the application of it to cotton embroidery is shewn by the evidence to be novel and fanciful, and I hold that it ought to be registered, and without prefixing the definite article. The principle of my decision will not authorize the registration as trade-marks of such words as "*Imperial*," "*Royal*," or "*Republican*": there must be some fancy exhibited in the application of the word.

Solicitors: *Wilson, Bristows, & Carpmael; Solicitor to the Board of Trade.*

G. M.

NORTH, J.

1885

May 15, 16, 18

NEWBOULD *v.* SMITH.

[1884 N. 369.]

Statutes of Limitations—Evidence—Entry against Interest—Payment of Interest—Agency.

The representative of a deceased mortgagee brought in 1884 a foreclosure action against the mortgagor, who pleaded the *Statutes of Limitations*. There was no evidence that any interest had been paid since 1866, except an entry in the books of the mortgagee of £50 as paid in 1878 by the mortgagor for rent and interest:—

Held, that though as an acknowledgment of money received it was against the interest of the person who made the entry, yet as it would prove the revival of a simple contract debt then barred, it was for his interest, and therefore could not be received as evidence on behalf of his representatives.

The solicitor of a mortgagor paid the interest to the mortgagee, and it was taken into account between them up to 1866. From that time the solicitor continued to pay the interest, but there was no proof that he acted as agent for the mortgagor or that the mortgagor furnished the money:

Held, in a foreclosure action brought in 1884, that there had been no sufficient payment of interest to take the case out of the *Statutes of Limitations*, and that the action was barred.

In 1863 *John Newbould*, a solicitor, lent to *Charles E. Smith* £430 on equitable mortgage of property in *Montague Street, Sheffield*. There were adjustments of accounts between them, the last being on the 12th of February, 1866, when the sum due on the mortgage, after payment by *Smith* of £110, was declared to be £350. On the 4th of July, 1878, *Smith* assigned his equity of redemption to his nephews, *B. Smith* and *S. Smith*. Up to the 12th of February, 1866, accounts between *Charles E. Smith* and *Newbould* had been kept by *Newbould*, but not regularly, and there were entries of receipts and of payments of ground-rents and interest. From the 12th of February, 1866, there were no entries in *Newbould's* ledger, and nothing was forthcoming except an entry in a diary kept by him, under the date of the 10th of September, 1878: "*Smith, C. E.*, cash on account of rent and interest £50," the entry being amongst the receipts by *Newbould*.

By an indenture dated the 16th of April, 1863, *Charles E. Smith* assigned to the Misses *Alderson*, who were clients of *Newbould's*, certain houses in *Franklin Street*, *Sheffield*, as security for £600 and interest. *Newbould* had, up to the 12th of February, 1866, when the adjustment took place, paid the interest to the Misses *Alderson*, and this seemed to have come into his account with *Charles E. Smith*. After that time *Newbould* continued to pay interest to Misses *Alderson*, and paid ground-rents on account of the *Montague Street* property, but there was no trace of any payment by *Charles E. Smith* on account of interest or ground-rents on this account.

In 1880 *Newbould* died intestate, and administration to his estate was granted to the Plaintiff. In 1882 the Misses *Alderson* transferred their mortgage to the Plaintiff, who, on the 14th of April, 1884, brought this action against *Charles E. Smith*, *B. Smith*, and *S. Smith* claiming foreclosure or sale of both of the mortgaged properties.

The Defendants pleaded the *Statutes of Limitations*. As to the *Montague Street* mortgage, there was no evidence of any other payments, receipts, or acknowledgments, and the only thing to take the case out of the statute was the entry as to the £50. *Charles E. Smith* denied that it was paid on account of the mortgage, and said that it was ground-rent on that property paid to *Newbould* as solicitor of the ground landlord. As to the *Sheffield Street* mortgage, the payment of interest by *Newbould* was relied upon to take the case out of the statute.

Charles E. Smith died before the hearing.

Barber, Q.C., and *C. Gould*, for the Plaintiff, proposed to read the entry in the diary as proof of a payment by the debtor so as to take the case out of the *Statutes of Limitations*, and the Court allowed it to be read *de bene esse*:—

It is an entry made by a deceased person against his own interest, as he admits himself to have received £50. [*Taylor* v. *Witham* (1), and other cases referred to in the judgment below were cited.] As to the other mortgage, it is shewn that *Newbould* up to 1866 paid the interest for *Smith*, and he continued to pay it

(1) 3 Ch. D. 605.

NORTH, J. 1885 NEWBOULD v. SMITH.

down to his death. The mortgagees could not know that *Smith* had not furnished the money, and they were not negligent: *Adnam* v. *Earl of Sandwich* (1). It cannot be the law that every mortgagee who receives his interest through some one else is bound every twelve years to apply to the mortgagor in person.

Warmington, Q.C., and *Anderson*, for the Defendants:—

In one way the entry in the diary is against the interest of *Newbould*, but it is now to be used in his favour. But there is not enough to shew that it related to the mortgage. As to the *Franklin Street* mortgage, there is nothing to shew that *Newbould* acted as agent for *Smith*, which is necessary in order to take the cases out of the statute: *Harlock* v. *Ashberry* (2), *Mills* v. *Fowkes* (3), and *Nash* v. *Hodgson* (4).

Barber, in reply as to the admissibility of the entry, cited *Ex parte Edwards* (5).

NORTH, J., after stating the facts of the case and reading the entry in *Newbould's* diary:—

Now that entry was tendered in evidence, and I was asked to receive it *de bene esse*, and I heard Mr. *Warmington* upon it afterwards. That entry is one which, if it is admissible, and if it proves what it is contended that it does prove, shews that on that day a sum of £50 was received by *Newbould* from *Smith* on account of rent and interest. The first question is whether that entry is admissible in evidence at all; and, secondly, what the weight of it is if it is admissible. The two questions really come very much to the same thing, but it seems to me that in strictness it is not admissible in evidence, and for this reason: The only way in which it can be admissible is as being an entry, made by a person who is dead, against his interest.

But was it against his interest? It is a receipt from *Smith* of cash on account of rent and interest. From one point of view no doubt it may be said to be an entry decidedly against *Newbould's*

(1) 2 Q. B. D. 485.
(2) 19 Ch. D. 539.
(3) 5 Bing. N. C. 455.
(4) 6 D. M. & G. 474.
(5) 14 Q. B. D. 415.

interest because it is an admission of the receipt of a certain sum in respect of which he would have to account, and in case he were to make a claim against *Smith* afterwards for what was due, it would be an admission which would diminish the amount that he would otherwise recover. But there is another thing to be considered before one can come to the conclusion that it is against his interest. Before it would be admissible at all one must find that the entry comes within what in *Smith* v. *Blakey* (1) Lord *Blackburn* laid down as the rule to be considered in dealing with cases like this. He says (2): "It was sought to make the letter admissible, as coming within the class of cases in which statements, whereby a deceased person has charged himself with or discharged another from the payment of money, have been admitted. And no doubt when entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted, after the death of the person making them, as evidence against third persons, not merely of the precise fact which is against interest, but of all matters involved in or knit up with the statement." And then he went on to enlarge upon that proposition, and to illustrate it by certain decisions to which he referred. Then, again, in the later case of *Massey* v. *Allen* (3) the same point came before *Hall*, V.-C. He applied the same rule and followed it, and he went to a length which is much farther than it is necessary for me to go here, because he held that an entry of "Bought for *C. J. Allen*" of so much stock on a given day although it appeared to be a note of purchase for *Allen* might in the event of the stock falling turn out really an entry for his own interest although apparently on its face it was against his interest. That, as I say, followed *Smith* v. *Blakey*. Now, was this entry against the interest of the person making it or in his favour? It seems to me in one view to be very strongly in his favour, and for this reason. The money had been lent by *Newbould* to *Smith* without any special security. It was merely a simple contract debt. In return for it a deposit of deeds was taken, and therefore there was

(1) Law Rep. 2 Q. B. 326. (2) Law Rep. 2 Q. B. 331.
(3) 13 Ch. D. 558.

NORTH, J. 1885 NEWBOULD v. SMITH.

a charge created upon land beside the liability of the debtor to pay a simple contract debt. For a certain time those two remedies stood side by side and the creditor might have resorted to either. He might either have sought to realise his security—and of course realising the security would have applied only to the land in it,—or he might have brought his action against *Smith*, and, by adopting that course, he would, on recovering judgment, have had execution against, not only the land comprised in the security, but against everything which *Smith* had in the world. The last transaction between them prior to September, 1878, was what took place in February, 1866, twelve years before. At that time therefore, namely, on the 10th of September, 1878, all right of action against *Smith* as a simple contract debtor had come to an end. The remedy against the land was the only remedy left. If in point of fact the payment of £50 on account of rent and interest had been made on that day it would have had the effect of reviving the right of action upon the debt as a simple contract debt. Therefore the making of this entry, if it is evidence of anything after *Newbould's* death, is evidence of something which would be very much in favour of the person making the entry. Now as regards the right to refer to this entry as evidence against *Smith* it seems to me that several of the authorities referred to are of considerable importance. The only one I need refer to now is *Briggs* v. *Wilson* (1). There the marginal note is this: "Where an indorsement on a promissory note of payment of interest, made by the authority of a deceased holder, appears to have been made after the *Statute of Limitations* had run, it is not evidence to exclude the operation of the statute." In that case the matter was gone into fully by *Turner*, L.J., who gave the reasons for the law being such, and cited cases which were the authorities upon which he laid it down as stated. Now, applying that in this case, this entry is made after the *Statute of Limitations* had run as against the simple contract debt, and therefore it appears to me that this is not admissible in evidence and is not a thing which can be looked at as evidence in support of the claim of the representatives of the person making the entry, for this very strong reason, that it is an entry which would be

(1) 5 D. M. & G. 12.

decidedly favourable to him and not adverse. It seems to me therefore that I cannot strictly receive it as evidence. But assuming that it were received in evidence I really should pay very little attention to it, and in my opinion it would not prove the Plaintiff's case, for this reason:—

[His Lordship then stated his reasons for this conclusion drawn from the correspondence and the circumstances.]

Therefore, as regards the £350, there is no evidence on which I can say that anything had occurred to take the case out of the statute. There is this further to be remembered, that the £50 was paid by *Smith* about two months after he had parted with the property which was comprised in the equitable mortgage; and I find nothing to shew that that payment was authorized by his sons to whom the property was transferred, or that he was in any way agent for them. It was suggested by Mr. *Barber*, that under the 40th section of the *Statute of Limitations*, 3 & 4 Will. 4, c. 27, it did not matter by whom the payment was made so long as it was made to the person entitled to receive it or his agent. But the case of *Harlock* v. *Ashberry* (1) is a clear decision by the Court of Appeal that the section must be read as if the words "by the person liable to pay" were actually found in the statute.

Then as regards the other debt there is really no evidence on which I can rely. It is said that the interest was regularly paid by *Newbould* to the Misses *Alderson*, and that those payments must be taken as having been made by him as agent for *Smith*, but I do not see any evidence of any such agency. All that appears is, that in February, 1866, some account was settled between them; but as it appears in *Newbould's* ledger, I do not think that the person to whom it was stated could make much of it. I will, however, assume that at that time an explanation was given, and that *Smith* was told that the result was that £350 would be left owing from him if he paid £110, and that *Smith* acted on that view and paid that sum: still it does not seem to me that because *Smith* repaid what his solicitor had advanced for rent and interest, it would be any evidence upon which I could come to the conclusion, that all subsequent payments made by *Newbould* to the Misses *Alderson* were payments made on account

(1) 19 Ch. D. 539.

NORTH, J.
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NEWBOULD v. SMITH.

of *Smith*, when there is no trace whatever after 1866 of any payment whatever having been made by *Smith*. It is impossible for me under these circumstances to say that there is any evidence of agency on the part of *Newbould*.

The case of *Adnam* v. *Earl of Sandwich* (1) was relied upon, but that was very different and proceeded upon a different section of the statute. I cannot apply it to this case, because I cannot find that there was any payment whatever made by the persons liable to pay or by any person under any authority from them The Court in that case saw its way to the conclusion that under the 3rd section of the Act 3 & 4 Will. 4, c. 27, the complaint by the plaintiff was made within the statutory time, but in the exact words of the 40th section I cannot find anything which brings the present case within that case. Although I think it clear that the mortgage debt has never been paid, yet having regard to the time that has elapsed since any payment or acknowledgment was made, the Plaintiff's claim fails and the action must be dismissed with costs.

Solicitors for Plaintiff: *Geare, Son, & Pease*, for *Newbould & Gould, Sheffield.*

Solicitors for Defendants: *Munton & Morris*, for *Parker & Brailsford, Sheffield.*

(1) 2 Q. B. D. 485.

C. M.

In re BROWN. BROWN *v.* BROWN.

[1883 B. 2835.]

PEARSON, J.
1885
May 9.

Trustees—Power of Investment—Uncontrolled Discretion.

A testator directed that his trustees should invest the moneys coming to their hands in respect of his estate in their names or under their control in such mode or modes of investment as they in their uncontrolled discretion should think fit. Before the commencement of an action to administer the testator's estate, the trustees (who were also executors) invested moneys forming part of it in the purchase of bonds of a foreign Government, bonds of a colonial railway company, and shares of a bank on which there was a further liability. The Chief Clerk, in taking the accounts of the testator's estate, disallowed the trustees the sums which they had expended in the purchase of these bonds and shares. The shares in the bank had been previously sold at a profit: —

Held, that, though the investments in question ought not to be retained by the trustees, yet, as they had acted *bonâ fide*, and no loss had resulted to the trust estate, they ought not to be disallowed the sums which they had laid out in making the investments.

THIS action was brought for the administration of the real and personal estate of *H. G. Brown*, who died on the 3rd of November, 1881.

By his will, dated the 5th of February, 1878, the testator appointed his wife, *Louisa Maria Brown*, his brother, *C. R. Brown*, and *C. J. Hewlett*, executors and trustees of his will. And he devised and bequeathed all the real and personal estate of or to which he should die possessed or entitled (except what he otherwise specifically disposed of by his will or any codicil thereto) to his trustees, their heirs, executors, administrators, and assigns, upon trust that his trustees should sell, call in, and convert into money the same, or such part thereof as should not consist of money, and should, with and out of the proceeds of such sale, calling in, and conversion, and with and out of such part of his personal estate as should consist of money, pay his funeral and testamentary expenses and debts, and certain specified legacies. And he directed that his trustees should invest all the remainder of the moneys coming to their hands in respect of his estate in

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their names or under their control in such mode or modes of investment as they in their uncontrolled discretion should think proper, with power from time to time, in the like discretion, to vary or transpose such investments, and should out of the income pay certain annuities, and he directed that all the rest of the income of his trust fund should be paid by his trustees to his wife during her life, and after her death the testator directed his trustees to hold the trust fund on certain trusts for the benefit of his daughters and their children. And the testator declared that it should be lawful for his trustees to defer and postpone the sale, conversion, and collection of the whole, or any part or parts, of his real and personal estate respectively so long as to his trustees should in their uncontrolled discretion seem proper. And he declared that the income produced from every or any part of his real or personal estate previous to the conversion or collection thereof pursuant to the trust thereinbefore declared, should be applied in the same manner in all respects as if the same were income proceeding from the investments of his residuary estate, and the whole of the income produced from his residuary estate (real or personal) in its actual condition or state of investment for the time being, whether proceeding from property or investments of an authorized or of an unauthorized description, and whether of a permanent or a wasting character, should, as well during the first year from his decease as at all times afterwards, be applicable as income under the trusts of his will, no part thereof being in any event liable to be retained as *corpus* or capital.

An administration judgment was pronounced on the 3rd of August, 1883. At the time of his death the testator was possessed of bonds and stock of foreign and colonial railway companies and bonds of foreign Governments, and of some shares in the *City Bank*, a joint stock company the liability on whose shares was limited. After his death, but before the commencement of the action, the trustees invested sums amounting to £5615 17*s.* 6*d.*, forming part of the estate, in the purchase of £1300 Turkish 6 per cent. bonds, 150 shares of the *City Bank*, debenture bonds for £1500 of the *Tasmanian Main Line Railway Company*, and £1000 Portuguese 5 per cent. bonds. There was

a further liability on the *City Bank* shares. Those shares had been since sold at a profit. The shares which the testator held in that bank at the time of his death had also been sold. The Chief Clerk in taking the accounts of the testator's estate, disallowed the trustees the above-mentioned sum of £5615 17*s.* 6*d.*, on the ground that it represented investments not authorized by the testator's will. The trustees took out a summons to vary the certificate in this respect. The summons came on to be heard with the hearing of the action on further consideration. The trustees also asked the sanction of the Court to the investment of moneys in Court in the action in certain specified securities, some of which were the inscribed stocks of the Governments of *New Zealand*, *Victoria*, and *New South Wales*.

The Chief Clerk had also certified that it would be fit and proper that the testator's outstanding personal estate should be retained in the investments in which it then was, except the Turkish and Portuguese bonds, and the *Tasmanian Railway* bonds.

Fischer, Q.C., and *A. Whitaker*, for the Plaintiffs :—

The discretion given to the trustees as to investment is unlimited, and, though they may have selected investments which the Court would not approve, they have acted *bonâ fide*, and they ought not to be disallowed the moneys which they have laid out in making these investments.

[PEARSON, J.:—Does the will authorize the investment of the trust funds on any securities out of the jurisdiction of the Court?]

Its terms are as wide as possible. At any rate the trustees ought to have credit for the profit made by the sale of the bank shares. It is proposed to sell the Portuguese bonds at once. *Bethell* v. *Abraham* (1), on which the Chief Clerk relied, was only a decision that, after an administration decree has been made, the Court will control the exercise by the trustees of their powers of management of the estate. Here the investments in question were made before the commencement of the action.

(1) Law Rep. 17 Eq. 24.

PEARSON, J. [PEARSON, J., referred to *In re Gadd* (1).]

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In re BROWN.

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No allegation of breach of trust was made against the trustees; the Chief Clerk acted *mero motu.*

J. G. Wood, for one of the trustees, who was a Defendant.

Middleton, for infants interested in the residue.

PEARSON, J.:—

So far as the trustees are concerned, I shall allow these investments; I cannot hold the trustees personally responsible. The terms of the powers are very wide, the trustees have acted *bonâ fide*, and there has been no loss to the trust estate. The securities in question ought to be converted, though the trustees have power to postpone the conversion, but the conversion ought not to be indefinitely postponed. I will sanction the proposed investments.

Solicitors: *Eagleton & Son; A. F. & R. W. Tweedie.*

(1) 23 Ch. D. 134.

W. L. C.

In re APPLETON.
BARBER *v.* TEBBIT.

[1883 A. 1024.]

C. A.
1885
May 19.

Will—Legacy to Person appointed Executor—Gift annexed to Office—Rebuttal of Presumption—Parol Evidence.

The mere fact that the gift of the legacy precedes the appointment of the legatee as executor—or that the legacies to several persons appointed executors differ either in their amount or subject-matter—is not enough by itself to rebut the presumption, that a legacy given to a person who is appointed executor is annexed to the office.

Jewis v. *Lawrence* (1) questioned.

Wildes v. *Davies* (2) explained.

Per Cotton, L.J. (*dubitante, Fry*, L.J.):—Parol evidence is admissible to rebut this, as well as any other, presumption.

JOHN APPLETON by his will, after devising and bequeathing all his estate to his trustees and executors thereinafter named upon trust to sell, and out of the proceeds to pay his legacies, debts, &c., proceeded to give a legacy of "£1000 to *John Tyler*, of *Leyton, Essex*, Esq.," and, among several others, "£300 to my executor, *James Tebbit*," and at end of the will appointed the said *J. Tyler* and *James Tebbit* trustees and executors of his will.

By a subsequent codicil he gave as follows: "I bequeath to *Frederick Oxley*, solicitor, £200 free of legacy duty. I appoint the said *F. Oxley* executor and trustee in addition to those therein named, and in every other respect I confirm my said will."

F. Oxley renounced probate of the will, but *James Tebbit*, the acting executor who proved, paid *F. Oxley* his legacy of £200.

The Plaintiff, the residuary legatee, questioned the propriety of this payment, and Mr. Justice *Chitty* held that the legacy was annexed to the office, and that *F. Oxley* not having proved the will, the payment was improper, and disallowed it in *J. Tebbit's*, the executor's, accounts.

Tebbit appealed.

(1) Law Rep. 8 Eq. 345. (2) 1 Sm. & Giff. 475; 22 L. J. (Ch.) 497.

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Whitehorne, Q.C. (*Badcock*, with him), for the Appellant (1):—

The general presumption that a gift to an executor is annexed to the office, and that if the executor does not prove, his legacy is forfeited, may be rebutted by shewing that the gift was made to him in another character. In all, or almost all, the cases where the legacy has been held to be annexed to the office, the appointment of the legatee as executor has preceded the gift to him of his legacy, but where the legacy is given in the first instance the subsequent appointment of the legatee as executor does not necessarily shew that the legacy is given to him in that character: *Compton* v. *Bloxham* (2).

Again, where there are several executors, a difference either in the amount or the subject-matter of the legacies bequeathed to them is held to rebut the presumption: *Cockerell* v. *Barber* (3); *Jewis* v. *Lawrence* (4). So although the actual decisions in *Stackpoole* v. *Howell* (5) and *Piggott* v. *Green* (6) are against the Appellant's contention, the Judges relied on circumstances, such as the position of the legacies all standing together, and the identity of the amounts, the absence of which in the present will tells in his favour. The gift in *Wildes* v. *Davies* (7), which is set out at p. 477 of the report in Sm. & Giff., is on all fours with the present gift, and the Judge held that it was not annexed to the office.

Ince, Q.C., and *Hamilton Humphreys*, for the Plaintiff, were not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty*, who decided that *F. Oxley*, who was appointed an executor by the

(1) It was proposed to put in an affidavit for the purpose of shewing that the testator had given the legacy to *Oxley*, not in his capacity as executor, but as a mark of his approval of the way in which he had transacted some business for him, but the affidavit was objected to, and it was not pressed. The effect is referred to by Lord Justice *Cotton* in his judgment.

(2) 2 Coll. 201.

(3) 2 Russ. 585, 594, n.

(4) Law Rep. 8 Eq. 345, 347.

(5) 13 Ves. 417.

(6) 6 Sim. 72.

(7) 1 Sim. & Giff. 475; 22 L. J. (Ch.) 497.

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codicil to the will of *J. Appleton*, could not take the legacy given to him by that codicil which, so far as is material, was as follows: [His Lordship read the codicil and proceeded:—] The question is whether *F. Oxley*, having renounced probate, can take the legacy. I take the rule to be correctly stated in *Williams* on Executors (1): "The presumption is, that a legacy to a person appointed executor is given to him in that character, and it is on him to shew something in the nature of the legacy, or other circumstances arising on the will, to repel that presumption." The author says "arising on the will," but I think that to rebut this, as well as any other, presumption, parol evidence may be admitted. But what is there in the present case to rebut the presumption? So far as there is any evidence at all it goes only to this, that the testator expressed his admiration for what had been done by Mr. *Oxley*, and proposed to give him a legacy, but apparently did not then think of appointing him executor. In addition to what was said in *Williams* on Executors, Sir *W. Grant* says in *Stackpoole* v. *Howell* (2): "The question is, whether you must not find circumstances to shew, that the legacy was intended for the executor in a distinct character; otherwise the presumption *primâ facie* is, that it is given to him, as executor." That is practically the same view, with the exception of the qualification, given in *Williams*. Is there, then, anything here to rebut the presumption? It is said that the general rule does not apply when the appointment of the legatee as executor follows the bequest of the legacy. I cannot see any reason for this distinction. It may be that in a particular will, where a number of legacies are given, and one of the numerous legatees is subsequently appointed an executor, the Court may come to the conclusion that the testator had not then present to his mind the idea of appointing him executor. But in the present case the testator almost in one and the same breath gives the legacy and makes the appointment, and it would, I think, be wrong to say that he had not in his mind, at the time he gave *Oxley* the legacy, the idea of appointing him executor. The only other ground on which it was urged that the general rule does not apply is that the legacy is of a different amount from the legacies

(1) 7th Ed. p. 1281. (2) 13 Ves. 421.

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given to the other executors, and undoubtedly a case has been quoted which does a little support that contention. In the case of *Jewis* v. *Lawrence* (1), Lord Justice *James*, then Vice-Chancellor *James*, says: "The presumption that a legacy to an executor is given to him in that character, may be rebutted; and it appears to me that the inequality in the subject-matter of the two gifts is sufficient in this case to rebut the presumption." In that case there was a gift of leasehold property to one of the persons named as executors—which was a gift of an entirely different nature from that given to *J. F. Paul*, the other executor. Whether the learned Judge was right in the construction which he put upon the gift in that will I do not say, but, if it is to be taken as deciding that the Court is to lay hold of any circumstances to take a case out of the general rule, it will be better to get rid of the general rule altogether. The decision being that of a Vice-Chancellor cannot bind this Court, and it cannot be taken as laying down a general rule, that a difference either in the nature or amount of the legacies given to the persons named as executors is of itself sufficient to shew that the gift is not attached to the office. *Compton* v. *Bloxham* (2) has been referred to, but in the will in that case the person named as executor was constantly referred to as "my brother," and the presumption arose that the gift was made to him in his character of brother and not of executor. Then *Wildes* v. *Davies* (3) has been mentioned. That case is somewhat startling as reported in 1 Sm. & Giff. 475. There two legacies of £200 each were given to the same person who was named as executor, but who did not prove the will, but the decision is directly against the Appellant's contention, when we look at what is evidently the more accurate report of the judgment as given in 22 L. J. (Ch.) 497. The gift, contained in a codicil, was in these words: "I give unto *John Hudson May* the sum of £200, and I hereby name *J. H. May* joint executor with *M. W. Clifton* and *G. Davies*. And in case my son should die in his present malady, then I bequeath £200 to the said *J. H. May*." In the report in 1 Sm. & Giff. 475, the judgment is thus given at p. 485: "Even under the old rule, the

(1) Law Rep. 8 Eq. 345, 347.
(2) 2 Coll. 201.
(3) 1 Sm. & Giff. 475; 22 L. J. (Ch.) 497.

words of this codicil would not have annexed it to the office; because there is this peculiarity in the present case, that there are two legacies, one of which is absolutely and clearly not connected with the office, whilst the other is contingent on the event of the son's death without having recovered . . . I must on the whole, hold that these legacies are not annexed to the office."

Before we saw the other report, I thought that the two gifts had been transposed in the judgment as therein given, because the subsequent gift in the event of the testator's son dying lunatic was so clearly not annexed to the office that the other gift, whatever might have been the case in the absence of the subsequent gift, being given by the same codicil, was also held not annexed to the office, and that seems to have been the real view of the case from the report in the *Law Journal*, which must be taken as stating more correctly what the Vice-Chancellor said. That report is as follows (1): "*Stuart*, V.C., said that the general rule was, that where there was a legacy given to an executor, it was to be taken as annexed to the office, and was only to be paid to him on condition that he proved the will. The Courts had, however, allowed very minute circumstances to take cases out of this rule. Here, there was this peculiarity—there was a legacy given to *J. H. May* in case the testator's son died in his present malady. To this he was at any rate entitled. Then there was a legacy of £200 given just above. Whatever might be the case as to the first legacy, if it stood by itself, he thought that, putting the two passages containing the gift together, he was entitled to both." That to my mind explains the decision, but it is against the contention of Mr. *Whitehorne*, that for the application of the rule it is necessary for the person to be named as executor in the first instance; for in that case the legacy was given to him in the first instance, and he was held entitled to take it simply on the ground that a subsequent clause in the same codicil which appointed him executor gave him a legacy which was clearly not given to him in his character of executor.

That shews that no stress was laid on the collocation of the clause.

I think the decision of Mr. Justice *Chitty* is right.

(1) 22 L. J. (Ch.) 497.

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LINDLEY, L.J. :—

I also think that the decision is right. The Defendant Mr. *Tebbit* has made a mistake in paying the legacy to Mr. *Oxley*, who, being a solicitor, should not have taken it. The obligation being on him to prove that the general rule is rebutted, what is there to discharge that obligation ? Nothing tangible. The only facts are, that he has a legacy of £200 given in the first instance, and in the next sentence he is appointed executor. There is nothing else unless we come to the conclusion that it is unreasonable, having regard to the inequalities of the legacies to the persons named executors, to treat them as having been made to them in their character of executors.

The only case cited at all near the line was *Jewis* v. *Lawrence* (1); no doubt it is—but it was not there a question of mere inequalities in the sums given, but a difference in the subject-matter of the gifts. The Vice-Chancellor came to the conclusion that under the circumstances of that case there was enough to rebut the ordinary presumption. We have not even that here, so I think the ordinary presumption must prevail and the appeal be dismissed.

FRY, L.J. :—

I am entirely of the same opinion. I think there is nothing to rebut the ordinary presumption.

On the point whether parol evidence is to be admitted, without expressing dissent from what has been said by Lord Justice *Cotton*, I should desire further time for consideration before saying definitely that I agree with him in his opinion as to the admissibility of that evidence.

E. Beaumont appeared for *F. Oxley*, and stated that he intended to refund to *Tebbit* the amount of the legacy.

Solicitors: *W. H. Crowder ; Johnson & Weatherall*, agents for *Barber & Bowly, Nottingham.*

(1) Law Rep. 8 Eq. 345.

M. W.

FENDALL *v.* O'CONNELL.

C. A.
1885
May 20.

[1884 F. 803.]

Husband and Wife—Affidavit as to Documents.

A husband and wife sued as co-Plaintiffs in respect of an alleged breach of trust by the trustees of their marriage settlement. The wife had a life estate for her separate use, and sued without a next friend. An order was made that the Plaintiffs should file an affidavit stating "whether they or either of them" had in the possession or power "of them or either of them," any documents relating to the matters in question. They filed an affidavit admitting the possession of various documents, which they scheduled, and going on to say, "We have not now, and never had, in our possession, custody, or power, or in the possession, custody, or power of any other person or persons on our behalf, any deed, &c., other than and except the documents set forth in the said schedule":—

Held (reversing the decision of *Bacon*, V.C.), that the Plaintiffs must be ordered to file a further and better affidavit, for that an affidavit relating only to documents in the joint custody of the husband and wife did not comply with the order, and that the order was right in requiring them to answer as to documents in the possession of either of them.

THIS was an action by Mr. and Mrs. *Fendall* and their infant children to make *O'Connell* and *Pennington*, who were the original trustees of the marriage settlement, dated the 23rd of February, 1876, of Mr. and Mrs. *Fendall*, liable for portions of the trust fund which had come to the hands of Messrs. *Parker & Co.*, solicitors, of *Bedford Row*, and been lost by the insolvency of that firm in 1884. The wife had a life estate to her separate use and sued without a next friend. The husband had a life interest. *O'Connell* had retired from the trust in November, 1879, and a member of the firm of *Parker & Co.* had been substituted. On the appointment of the new trustee, *O'Connell* and *Pennington* handed over a sum of £2100 to *Parker & Co.*, as solicitors to the trustees, that it might be invested. The Plaintiffs sought to make the two Defendants jointly and severally liable to replace that sum.

On the 17th of November, 1884, an order was made on the application of *O'Connell*, "that the Plaintiffs, *Cecil W. C. Fendall* and *Mary Sarah* his wife, and the said *Cecil W. C. Fendall* on behalf

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of the above-named infant Plaintiffs, do within, &c., make and file a full and sufficient affidavit, or full and sufficient affidavits, stating whether they, or any, or either of them, have, or have had, or has, or has had in the possession or power of them, or any or either of them, any, and if any, what documents relating to the matters in question in this action, and accounting for the same."

Mr. and Mrs. *Fendall* filed an affidavit in the following form:— "We *C. W. C. Fendall* and *Mary Sarah Fendall* his wife, two of the above-named Plaintiffs, make oath and say as follows:— (1.) We have in our possession or power the documents relating to the matters in question in this suit set forth in the 1st and 2nd parts of the 1st schedule hereto." (2.) The deponents objected to production of the documents in the second part. "(3.) According to the best of our knowledge, information, and belief, we have not now and never had in our possession, custody, or power, or in the possession, custody, or power of our solicitors, or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on our behalf, any deed," &c., "other than and except the documents set forth in the said 1st schedule hereto."

O'Connell took out a summons to consider the sufficiency of this affidavit, and Vice-Chancellor *Bacon*, in Chambers, held it to be sufficient. *O'Connell* appealed.

Smart, for the Appellant:—

If the deponents were not husband and wife it is clear that an affidavit stating that "we have not in our possession" any documents except those specified would be insufficient. That they are husband and wife makes no difference. Letters to me at *Lincoln's Inn* on my business are not in the custody of myself and my wife, and letters addressed to her about her separate estate and kept in her desk are not in our custody, but only in hers.

Fellowes, contrà:—

This is purely a technical requisition.

[LINDLEY, L.J.:—I am not sure of that. If the point is purely technical why do you contest it?]

There was no intention to suppress letters kept by one of the parties. The Chief Clerk looked at the schedule, and was satisfied that the letters addressed to each were included.

[FRY, L.J.:—Suppose the lady suppressed a letter addressed to her which she had kept, and which related to her separate estate, how could she be indicted for perjury on this affidavit? Moreover, how can you say that it complies with the order?]

COTTON, L.J.:—

This is an appeal from the refusal of Vice-Chancellor *Bacon* to order a further and better affidavit as to documents to be made by *Fendall* and wife. The suit relates to property in which the husband has an interest, and the wife has a life estate to her separate use. An order was made upon them that they and the husband on behalf of their infant children should make an affidavit as to documents in the possession "of them or any or either of them." They put in an affidavit stating that they have "in our possession" certain specified documents, and then saying "we have not now and never had in our possession, &c., or in the possession, &c., of our solicitors, &c., or of any other persons or person, on our behalf," any documents other than those specified. Is this sufficient? In my opinion it is not. It should have said, "we have not, nor has either of us," &c. That is clear on the terms of the order, which are decisive on the point, and this alone disposes of the case.

But I am further of opinion that the order was right in requiring the affidavit to be made in this form. When a husband and wife are co-Plaintiffs, the wife suing in respect of her separate estate without a next friend, they ought to answer severally as to documents, for the wife may have in her actual possession documents relating to her separate estate. If so, she holds them as part of her separate estate, and she must answer as to them. They are in no sense in the custody of the husband and wife.

LINDLEY, L.J.:—

I am of the same opinion. This affidavit only goes to documents in the joint possession of the husband and wife, and there-

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fore does not comply with the order. Apart from this, having regard to the present status of married women, an affidavit by husband and wife confined to documents in their joint possession would be in substance insufficient, for it would enable them to keep back documents of which they respectively had separate possession.

FRY, L.J.:—

I am of the same opinion. The affidavit does not comply with the order, and that is enough to dispose of the case. Having regard to the present state of the law of husband and wife, I think that the order was in proper form.

Solicitors for Plaintiffs: *Stibbard, Gibson, & Co.*
Solicitors for Defendants: *Ward, Mills, Witham, & Lambert.*

H. C. J.

C. A. 1885 *Feb.* 7, 27; *May* 22.

BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY *v.* CUNLIFFE, BROOKS & CO.

[1883 B. 14.]

Building Society—Borrowing Powers—Overdrawing Bankers' Accounts—Action for Account—Money paid in Mistake of Law—Ratification—Payment to withdrawing Members—Priority of Securities.

A benefit building society which had never been incorporated, and had no power to borrow money, was allowed by its bankers to make large overdrafts, and the directors of the society signed a memorandum giving the bankers a lien upon all the society's deeds, to secure all moneys which from time to time might be owing by the society to the bankers on the balance of the banking account. Annual balance-sheets, shewing the amounts due to the bankers, were sent to all the members of the society, and adopted at the annual meetings. The society was afterwards ordered to be wound up, and as the overdrafts were *ultra vires*, being a borrowing unauthorized by the rules, the official liquidator brought an action against the bankers to recover all moneys which had been paid to them by the society and applied by the bankers in discharge of their loan to the society:—

Held, that it was no answer to such action that the moneys had been so applied by the order of the directors of the society under a mistake of law as to their power to borrow, since the acts of the directors, both in borrowing

and in directing the application of the moneys, were unauthorized and not binding on the society.

Held, also, that there had been no ratification of such acts of the directors by all the members of the society, as such ratification could not be implied from merely seeing and not questioning the balance-sheet accounts which had been sent to them, and no ratification of such acts by the majority would bind the minority of the members.

The bankers, were however, allowed to stand in the place of withdrawing members of the society who had been paid on notice of withdrawal out of moneys so advanced by the bankers, and to receive the amounts which would be payable to such members if they had not been paid off.

The bankers were also to have the benefit of securities obtained by the society by means of the overdrafts allowed by the bankers, and to have the benefit of such securities according to their order of priority without being postponed until after other securities granted to the society.

APPEAL from a judgment of the Vice-Chancellor of the county palatine of *Lancaster* given in June, 1883, in an action by the official liquidators of the *Blackburn and District Benefit Building Society* against the Defendants, bankers at *Blackburn*, who were the bankers of the society.

The society was established in 1868 under 6 & 7 Will. 4, c. 32. It was never incorporated under the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42), but its rules were duly certified by the barrister, and were in the main similar to other building societies. There was no rule which authorized the borrowing of money by the society.

In January, 1874, an account was opened by the society with the Defendants as bankers in the names of the trustees of the society in accordance with rule 47 of the society's rules (1). The account was sometimes overdrawn to a large amount, viz. £10,000 and upwards, and sometimes it was in credit, but after the 3rd of May, 1878, it was always overdrawn. Balance-sheets shewing the state of the society's account with its bankers were annually sent to all the members of the society and adopted at their annual meetings. On the 23rd of July, 1881, a petition was presented for winding up the society, and on the 25th of October, 1881, an order was made on such petition for the liquidation of the society and for the appointment of the Plaintiffs as the official liquidators.

(1) This and the other material rules of the society are set out in *Cunliffe, Brooks & Co.* v. *Blackburn Benefit Society*, 9 App. Cas. 858.

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An action was brought in November, 1881, by the official liquidators against the present Defendants to recover deeds and other securities which had been deposited with the Defendants by the directors of the society to secure the balance which might from time to time be due to the Defendants on the banking account. Judgment in favour of the Plaintiffs was given by the Vice-Chancellor of the county palatine, and the case came afterwards by way of appeal before the Court of Appeal and the House of Lords (1), and in the result it was held that the overdrawing of the account being *ultrà vires*, the Defendants were only entitled to a lien on the securities for such advances as had been applied in payment of the debts and liabilities of the society properly payable.

The present action was brought by the liquidators to recover all moneys paid in to the banking account, and applied by the Defendants in discharging or reducing the balance of the overdrawn account. The nature of this last action and the facts connected with it are fully stated in the judgment of the Court, as delivered by Lord Justice *Cotton*. The action was tried before the Vice-Chancellor of the Duchy of *Lancaster* who gave judgment in favour of the Plaintiffs on the 29th of June, 1883. By that judgment it was declared that the Defendants were not entitled to be allowed in account between themselves and the society any sums paid or advanced by the Defendants by way of overdraft, or any interest or commission (if any) charged by the Defendants in respect to such overdraft, except so far as such overdraft might have been applied in payment or satisfaction of the debts and liabilities of the society properly payable; and it was declared that payments made out of overdraft to withdrawal members of the society were not payments in satisfaction of the debts and liabilities of the society properly payable; and it was declared that the Defendants were entitled to set off against the amount of such overdraft as should be disallowed on account such sums (if any) as should have been paid or repaid to or otherwise received by the society by or on behalf of advanced members by way of bonus, &c., in respect of any advance by the society out of such overdraft, and also all sums of money which the Defendants

(1) 22 Ch. D. 61; 9 App. Cas. 857.

should pay to the Plaintiffs under the judgment in the said former action by the Plaintiffs against the Defendants; and it was also declared that subject to the payment of the costs of and incidental to the winding-up of the said society, if and so far as the other assets of the society were insufficient to pay the same, and subject to all mortgages and charges to the society in respect of advances by the society out of its own proper funds, the Defendants were as against the said society and the members thereof entitled to a lien or charge upon any mortgage securities to be taken by the society in respect of advances out of such overdraft to the extent of what, having regard to these declarations and to the account and inquiries directed to be taken, might be the amount ultimately disallowed to them in respect of the sums paid or advanced by them by way of overdraft. The judgment concluded with ordering such account and inquiries to be taken and made as were there specified.

The Defendants appealed from this judgment, and the Plaintiffs gave notice of intention to apply to vary the judgment as to the mode of ascertaining the sums advanced by way of overdraft.

Davey, Q.C., and *H. B. Buckley* (*Rigby*, Q.C., with them), for the Defendants:—

It must now be admitted after the decision in the House of Lords in the action between these parties (1) that the overdraft was a borrowing, which was not within the rules, and was therefore *ultrà vires*, but although the bankers, the Defendants, cannot recover, therefore, what might be due to them in respect of such advances it does not follow that they ought to be made to repay what they have received in reduction of their loan. The whole transaction has been completed, and the society cannot now, after having had the benefit of it, re-open the account and recover back what has been paid. The case does not differ from the ordinary case in which money is not allowed to be recovered back which has been paid under an illegal or immoral contract. Moreover, the balance-sheets of the society shewing what had been borrowed and what remained due to the bankers in respect thereof, were sent to all its members, and their acquiescence

(1) 9 App. Cas. 857.

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must be taken to amount to a ratification by them of what the directors had done, and of this application of the moneys in the bankers' hands to the reduction of the overdrawn account. The borrowing though *ultrà vires* is not an illegal act. It was competent to the society at any time to have given itself power to borrow by making a rule to that effect, and such a rule would be valid: *In re Guardian Permanent Benefit Building Society* (1); *Murray* v. *Scott* (2); and therefore it was competent for the members of the society to ratify what had been done by the directors, and there was sufficient evidence here of the members having done so, it not being necessary for that purpose to prove the acquiescence of each individual member: *Phosphate of Lime Company* v. *Green* (3). Next, the Defendants ought to be placed in the position of the withdrawing members who had been paid out of the moneys which had been advanced by them on this banking account. It has been held that withdrawing members of this society are entitled to be paid out of the assets in priority to the other members: *In re Blackburn and District Benefit Building Society* (4). The Defendants should be allowed to receive what would be payable to these withdrawing members if they had not been paid off. Further, the decree of the Vice-Chancellor has postponed the Defendants' right to the benefit of the securities taken by the society out of the advances made by the overdrafts until after the other mortgages and securities given to the society. This ought not to be, and the words in the decree "subject to all mortgages and charges to the society in respect of advances by the society out of its own proper funds," should therefore be struck out.

Sir *F. Herschell*, S.G., and *Macnaghten*, Q.C. (*Snow*, with them), for the Plaintiffs:—

The overdrafts have been decided to have been *ultrà vires*, and cannot therefore be the subject of any debt due by the society which can be set off against the society in taking the accounts between the society and its bankers. The directors had no autho-

(1) 23 Ch. D. 440.
(2) 9 App. Cas. 519.
(3) Law Rep. 7 C. P. 43.
(4) 24 Ch. D. 421; 10 App. Cas. 33, *nom. Walton* v. *Edge*.

rity to authorize the bankers to apply what was paid into the bank on behalf of the society in discharge of such overdrafts: *Ex parte Williamson* (1); *Richardson* v. *Williamson* (2). This is not like the case of money paid under a mistake of the law; there was no mistake of law here, besides which, the money was not paid by or applied with the authority of the society, but of the directors, who had no authority to act so.

Then, although according to the principle of the rule allowed in *In re Cork and Youghal Railway Company* (3), the Defendants ought to have the benefit of so much of the advances out of the overdrafts as went to pay off the debts which were properly recoverable against the society, still the judgment of the Vice-Chancellor ought not to have given the Defendants a lien on the securities taken by the society in respect of such advances. There could be no contract which would give a right to lien.

Davey, in reply.

1885. May 22. COTTON, L.J., now delivered the following judgment of the Court (*Brett*, M.R., *Cotton* and *Lindley*, L.JJ.):—

This is an action brought by the official liquidators of the *Blackburn and District Benefit Building Society* against the bankers of the society. In form the action is for an account, but in substance it is to recover from the bankers moneys from time to time paid to them by the society and applied by them towards discharging the balance alleged by the bankers to be due to them from the society upon their banking account, which was considerably overdrawn.

The society is a benefit building society established in 1868 under the Act 6 & 7 Will. 4, c. 32. It was never incorporated under the *Building Societies Act*, 1874. On the 23rd of July, 1881, a petition was presented for winding up the society, and on the 25th of October, 1881, it was ordered to be wound up.

The rules of the society were certified on the 7th of May, 1868, and those rules did not authorize the directors to borrow money on behalf of the society.

(1) Law Rep. 5 Ch. 309. (2) Law Rep. 6 Q. B. 276.
(3) Law Rep. 4 Ch. 748.

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In 1874 the directors of the society, in accordance with one of the rules (47), opened a banking account in the names of the trustees of the society with the Defendants. The account was headed "The trustees of the *Blackburn and District Building Society*, *Broadbent* and *Hutchinson*, secretaries, in account current with Messrs. *Cunliffe, Brooks, & Co., Old Bank, Blackburn.*"

Into this account the moneys of the society were paid from time to time as received, and on the other hand cheques were drawn upon it for the purposes of the society, or for what the directors considered to be such purposes. The account was sometimes overdrawn and sometimes in credit. From the 6th of March, 1875, to the 3rd of May, 1878, it was largely overdrawn. On the last mentioned day it was in credit; but after that day until the winding-up of the society the account was always overdrawn. The overdraft often amounted to more than £10,000, but at the commencement of the winding-up the account was only overdrawn to the extent of about £2700, the balance against the society having been reduced to this amount by payments made from time to time to the credit of the account.

The mortgage and other securities of the society appear to have been kept from the first at its bankers for safe custody; but on the 27th of September, 1876, the directors signed a memorandum giving the bankers a lien upon all the society's deeds and documents to secure all moneys which from time to time might be owing by the society to the bankers on the balance of the banking account. Annual balance-sheets shewing the amounts due to the bankers were sent to all the members of the society.

In November, 1881, the liquidators of the society brought an action against the bankers to recover the securities held by them, and the Vice-Chancellor of the county palatine gave judgment in the plaintiffs' favour, and ordered the bankers to deliver up the securities they held. From this judgment the bankers appealed. The Court of Appeal agreed with the Vice-Chancellor in thinking that the directors of the society had no power to borrow money on the credit of the society, or to give any security on the property of the society for money borrowed; but the Court of Appeal held that the bankers were entitled to a lien on the securities they held for such of their advances (but for such only), as had been

applied in payment of the debts and liabilities of the society properly payable, and the Court of Appeal accordingly reversed the order of the Vice-Chancellor, and remitted the case back to him with various declarations and inquiries based upon the above principle: see 22 Ch. Div. 61. From this decision the bankers appealed to the House of Lords, but their appeal was unsuccessful: see 9 App. Cas. 857.

This litigation decided, in addition to the question already mentioned, that the bankers were not entitled to a lien for moneys paid by the society to members who had withdrawn from the society, nor to the benefit of moneys advanced by the society to borrowing members, on the ground that nothing ought to have been either paid to withdrawing members or advanced to borrowing members out of borrowed capital.

In directing the accounts and inquiries to give effect to the lien of the bankers to the limited extent to which it was upheld, the Court, amongst other things, declared that the bankers were to be charged with all sums received by them on account of the society since the time when the society last ceased to have any balance standing to its credit on its account with the bankers, and that the bankers were not to be allowed any sums advanced by them to the order or on account of the society since the same time and applied by the society otherwise than in paying debts and liabilities of the society properly payable.

The object of the present action is to go still further than before, and to compel the bankers to refund all moneys of the society applied by the bankers in discharge of their loan to the society. For this purpose the liquidators of the society claim an account of all moneys received and paid by the bankers for the society, with a declaration that in taking the account the bankers are to be charged with all sums received by them on account of the society since the date when they were appointed bankers thereof, and that they are not to be allowed any sums paid by way of overdraft, or otherwise by way of loan, which have been applied otherwise than in payment of the legitimate debts and liabilities of the society.

The action came on to be heard before the Vice-Chancellor of the county palatine, and his decision was in favour of the

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liquidators and against the bankers, and from his decision the bankers have appealed.

It was urged on behalf of the appeal that the moneys sought to be recovered were applied by order of the directors in repayment of the moneys borrowed under a mistake of law as to their power to borrow, and that no one can recover money so paid voluntarily, or money paid on an illegal contract. This is correct where the same person who made the payment, or was party to the contract, seeks to recover the money. But here the liquidators are suing on behalf of the society, and complain that the directors, both in borrowing and in directing the application of the moneys of the society, acted in excess of the authority given to them; and that their acts do not bind the society, and that the bankers knew that the directors had no authority so to deal with the moneys of the society. This, in our opinion, is correct, and consequently the acts of the directors were unauthorized, and are not to be considered as acts of the society, and this objection cannot be maintained.

It was also urged by the Appellants that the society was not a corporation, that all the individuals who made up the society, by seeing the accounts circulated, knew that the directors had borrowed money, and were applying the funds of the society in repaying the money so borrowed, and that they must be taken to have ratified the acts of the directors. But these acts were not within the scope and objects of the society, so that no majority could even in general meeting bind the minority present, or any absent member, and in our opinion it would be wrong to hold that all members of the society, from merely receiving the accounts, knew that the directors had borrowed money from their bankers, and had authorized repayment out of the funds of the society. For although this was a conclusion which would probably be drawn from a careful examination and comparison of the accounts, it would, in our opinion, be wrong to draw the conclusion that all members in fact understood that this was the effect of the accounts, or even that they examined or read the accounts. Even if they did, there was no ratification. For although nothing was done to question the accounts, no other ratification was alleged, and mere omission to question the accounts or acts of the directors cannot properly be treated as

ratification. The loans and repayment were not stated as matters to be ratified, they were represented as, and considered to be, acts within the powers of the directors, and there was no intention to ratify. In our opinion, therefore, it cannot be maintained that all the members of the society had ratified the application of the money sought to be recovered.

Possibly the bankers may be able to prove that some of the members not only knew of but intended to adopt and ratify the dealings of the directors. This judgment in no way deals with and will not prejudice such claim, if any, as the bankers may be advised to make in respect of any moneys payable to such of the members, or representatives of deceased members, as concurred in the dealings of the directors with the moneys of the company. This is not a question for decision in the present action.

On the main question the Appellants, in our opinion, fail. But some minor objections were taken to the judgment. It was alleged that out of moneys advanced by the bankers payments were made to members who had given notice of withdrawal. No allowance has been made to the bankers in respect of the sums so paid, and it was contended by the Appellants that as these members, if they had not been paid off, would now be entitled to be paid off out of the assets of the society in priority to the continuing members, the bankers are entitled to stand in the place of the withdrawing members so paid, and receive or be allowed in account the amounts which would be payable to such withdrawing members if they had not been paid off. This was not objected to by the Plaintiffs. We think the claim right, and the necessary addition should be made to the judgment. It was contended by the Appellants that the account ought not to be carried back further than May, 1878, and that this was decided by the judgment of the Court of Appeal and of the House of Lords in the previous case. It does not exactly appear why the account in that case was limited to the period mentioned; but having regard to the difference between the questions decided in that and in the present action, we think that that judgment does not decide how far back the accounts directed in the present action should be carried, and that there is no ground for limiting them to the period suggested.

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The judgment gives the bankers a lien on any mortgage securities taken by the society in respect of advances out of the moneys advanced by the bankers, but directs that this lien shall be subject to all mortgages and charges granted to the society in respect of advances made by the society out of its proper funds. The Appellants object to their lien being so postponed. The securities on which they are to have a lien were acquired by the society by means of the overdraft allowed by the bankers, if there had been no such advances or loan by the bankers the securities would not have existed, and in our opinion the bankers are entitled to the benefit of these securities according to their order of priority, and we think that the judgment ought to be corrected by striking out the words "subject to all mortgages and charges to the society in respect of advances made by the society out of its own proper funds." Mr. *Macnaghten*, for the liquidators, contended that the judgment was too favourable to the bankers. He contended that they ought not to be allowed to have a lien on the securities taken by the society in respect of advances made out of moneys lent by them by way of overdraft to the society, and that as wrongdoers they ought only to be allowed the sum, if any, by which it may be shewn that the property of the society was improved by means of the moneys lent by them. But this objection, we think, cannot be supported. The bankers, though dealing with the directors in matters which were not within the authority of the directors, were not acting fraudulently. The case of *In re Guardian Permanent Benefit Building Society* (1) was not in point. The money there in question was secured by mortgage on property of the society. The mortgages here were on the property not of the society but of its members, and the society acquired their interest in the property by means of the money lent by the bankers. The consequence of this variation in the judgment of the Vice-Chancellor is that his direction that the lien of the bankers is to be subject to the costs of the winding-up, must also be struck out, for we treat the mortgages given to secure sums lent out of money advanced by the bankers as property which they are entitled to claim, that is, as their property, and consequently that it ought not to be subject to the costs of winding-up.

(1) 23 Ch. D. 440.

Order appealed from varied accordingly. No costs of appeal to either party; but the costs of the liquidators to be paid out of the assets.

Solicitors for Appellants: *Gregory, Rowcliffes, & Co.*, agents for *Addleshaw & Warburton, Manchester.*

Solicitor for Respondents: *H. G. Field*, agent for *Danger & Neville, Liverpool.*

W. P.

In re BLAKE. JONES *v.* BLAKE.

[1884 B. 3556.]

Practice—Administration—Cestui que trust—Residuary Legatee—Infant Plaintiff—Limited Accounts and Inquiries—Costs—Rules of Supreme Court, 1883, *Order* LV., *rr.* 3, 4, 10; *Order* LXV., *r.* 1—*Devise—Trustees—Trust for Sale—Postponing Sale—Discretion.*

A party interested in the estate of a deceased person, even though that party be an infant, is not entitled, as a matter of course, to an administration judgment at the expense of the estate. Having regard to Rules of Supreme Court, 1883, Order LV., rule 10, a party interested is only entitled to an administration judgment where there are questions which cannot be properly determined except by an administration action; but the Court has power under that rule to order a limited administration only, that is, to direct particular accounts and inquiries, if it sees that the questions can thus be properly determined, the object of the rule being to prevent general administration except in cases of necessity; and the Court, in the exercise of its discretion as to costs under Order LXV., rule 1, will order the Plaintiff—if an infant, then the next friend—to pay the costs of any unnecessary or improper administration proceedings.

Order of *Kay*, J., varied.

In re Wilson (1) considered.

Where real estate is devised to trustees in trust for sale, with a discretionary power to postpone the sale, the Court will not interfere with a *bonâ fide* exercise of their discretion as to the time and mode of sale.

THE main question raised in this case was whether, under the present practice, an infant interested in the estate of a deceased person is entitled as a matter of course, as under the old practice, to an administration judgment at the expense of the estate.

(1) 28 Ch. D. 457.

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Susanna Blake, widow, who died on the 2nd of June, 1883, by her will, dated the 22nd of August, 1882, after giving certain pecuniary and specific legacies, gave her residuary real and personal estate to her trustees and executors, whom she directed to sell the same with all convenient speed, with power to postpone the sale at their discretion, and to hold the proceeds in trust for her children and grandchildren in equal sixth shares as therein mentioned.

The trustees having advertised the testatrix's real estate—which consisted mainly of extensive agricultural property in the county of *Norfolk*—for sale by auction, this originating summons was taken out by two of the residuary legatees, each entitled to one-sixth of the residue, one of the Plaintiffs being an infant suing by her next friend, asking (1) That the Defendants, the trustees and executors, might abstain from selling the real estate except under the direction of the Court; (2) An account of what the outstanding estate of the testatrix consisted, particularly in respect of what was due from the estate of her late husband, and directions as to what steps should be taken to realise the same; (3) An account of the liabilities of the testatrix's estate in respect of her late husband's estate; (4) That the trustees should abstain from paying a certain conditional legacy of £3000 given by the testatrix to her son *Henry Blake*, without the leave of the Court; and (5) If and so far as should be necessary, general administration.

Upon the summons coming on for hearing on the 14th of April, 1885, a considerable amount of evidence was read which, as to the first claim, was directed to shew that the time fixed by the trustees for the sale was unfavourable, and that the property had not been lotted to the best advantage. It also appeared that questions had arisen as to certain alleged outstanding assets and liabilities, and as to the mode in which they ought to be got in and provided for. Mr. Justice *Kay* refused to make any order on the summons, except that he dismissed the first claim with costs, and the rest of the summons without costs.

In the course of his judgment his Lordship said: "I extremely regret to see that a very large amount of evidence has been gone into and even cross-examination of the solicitor to the trustees.

All I can say is that I exceedingly disapprove of the whole thing, and I notice that it is commenced, as to one of the persons originating it, in the name of an infant, obviously with the intention of carrying on the litigation at the expense of an estate without risk of the loss of costs to the real Plaintiff, who is the next friend of the infant."

The Plaintiffs appealed from his Lordship's decision.

Robinson, Q.C., and *P. H. Lawrence*, for the Appellants:—

We submit that the evidence makes out a case for stopping the sale of the real estate; at all events the learned Judge was wrong in refusing to direct administration. There can be no doubt that under the old practice an administration decree would have been granted as a matter of course at the instance of *cestuis que trust*, and there is nothing in the new rules which takes away that right where, as in the present case, numerous questions must necessarily arise in the administration of this estate. Order LV. of the Rules of the Supreme Court, 1883, provides (rule 3), that any devisee or legatee may take out an originating summons for the determination, without administration, of any question arising in the administration of the estate, and (rule 4) may in like manner apply for and obtain an order for the administration of the real and personal estate. Then rule 10 says, "It shall not be obligatory on the Court or a Judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order." That rule only applies to cases where the decision of the Court is required for the simple determination of one or more questions arising under a will and where administration is not wanted; it is not intended to interfere with the right, as in the present case, of an infant to come to the Court for the protection of the property given for his benefit, and the Court will not exercise its discretion as to costs conferred by Order LXV., rule 1, by requiring the next friend of the infant, as the condition of his being allowed his costs, to satisfy the Court that the estate in which the infant is interested requires administration; for that would practically be refusing

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to infants that protection which the Court has always given them: *per* Mr. Justice *Pearson* in *In re Wilson* (1).

Hastings, Q.C., and *H. Percival*, for the respondents, the trustees, were not called upon.

COTTON, L.J.:—

This is an appeal from the decision of Mr. Justice *Kay*, who, on an originating summons being taken out by two of the parties interested in the residuary estate of *Susannah Blake*, declined to make any order at all, except that, as regards one part of the order asked for, he made the applicants pay the costs, and, as regards the rest of it, refused to make any order either as to costs or otherwise. Formerly, if any one interested in a residuary estate instituted a suit to administer the estate, he had the right to require, and as a matter of course obtained, the full decree for the administration of the estate; and the Court, even if it thought that, although there were really questions which required decision, those questions might be decided upon some only of the accounts and inquiries which formed part of the decree, found itself fettered and unable to restrict the accounts and inquiries to such only as were necessary in order to work out the question.

Now, however, the practice is laid down by rule 10 of Order LV. as follows: "It shall not be obligatory on the Court or a Judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order."

Where there are questions which cannot properly be determined without some accounts and inquiries or directions which would form part of an ordinary administration decree, then the right of the party to have the decree or order is not taken away, but the Court may restrict the order simply to those points which will enable the question which requires to be adjudicated upon to be settled. That is the result of Order LV., r. 10. Then we have Order LXV., r. 1, which says: "Subject to the provisions of the Acts and these rules, the costs of and incident to

(1) 28 Ch. D. 457.

all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge."

These two rules must be read together, and we then find this: That if a party comes and insists that there is a question to be determined, and, for the purposes of determining that question, asks for an administration judgment, the Court cannot refuse the judgment, unless it sees that there is no question which requires its decision; but rule 1 of Order LXV. puts the party who applies for the judgment and insists upon it in this position—that if it turns out that what has been represented as the substantial question requiring adjudication is one which was not a substantial question, or that the applicant was entirely wrong in his contention as to that particular question, the Court can, and, in my opinion, ought ordinarily to make the person who gets the judgment pay the costs of all the proceedings consequent upon his unnecessary or possibly vexatious application to the Court.

In my opinion, if parties come and wrongfully ask the Court for an administration judgment or a part of one, then they ought in the end, when the action is found to have been unnecessary, to be made to pay the costs of it: of course the costs in each case will be within the discretion of this Court; but that in my opinion is the rule on which the Courts ought to proceed so as to check unnecessary and, still more, vexatious litigation.

In the present case I am of opinion that Mr. Justice *Kay* was quite right as regards the dismissal of those portions of the summons which he dismissed with costs: that is, the portions which refer to staying the sale of the estate. There are landed estates in the county of *Norfolk* which are left to the trustees with what is really a trust for sale, because they were authorized and directed to sell, with a discretionary power of postponing the sale; and they are proceeding, having exercised their judgment, to sell at once without any longer postponement. In my opinion it would be contrary to principle to interfere with the discretion of the trustees. They have considered the matter, and having regard to the circumstances of the case they say they consider that it would be proper to sell. Being, then, of opinion that it would be altogether wrong to interfere with the discretion of the

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trustees, I think the learned Judge was right in dismissing with costs that part of the summons which seeks to restrain the trustees from selling; and also I think that as regards the fourth claim, as to the legacy payable to *Henry*, there is no ground shewn for restraining the executors from paying the legacy when it becomes payable.

As regards the remainder of the summons some questions do seem to arise.

[His Lordship then stated the questions that arose as to outstanding assets and liabilities, and continued:—]

I think we have no right to refuse an order directing certain inquiries specially directed to those questions, but it will be hereafter the duty of the Court to decide whether the Plaintiffs have been reasonable in asking for these inquiries, whether they are wrong in their litigation, and whether they ought to pay the costs.

That being so, what we propose to do is to make a modified judgment. Lord Justice *Fry* has prepared and will read what the terms will be, and as regards the costs of this appeal they will be costs in the action to be dealt with when the action is decided.

LINDLEY, L.J.:—

I take the same view. The decision of Mr. Justice *Pearson* to which Mr. *Robinson* called our attention appears to me to be substantially correct, subject to one qualification. Care must be taken not to give countenance to the notion that by seeking out an infant plaintiff who may be a residuary legatee, or interested, perhaps, in a very small portion of the estate, an administration judgment may be obtained at the expense of the estate as a matter of course as it used to be obtained. I hope that state of things is gone, and gone for ever: it was one of the greatest scandals of the profession. It is struck at, and I hope most effectively, by means of Order LV., and especially by Order LXV. as to costs, since, subject to a reservation made by the latter rule with regard to the right of executors and trustees and mortgagees as to costs, the costs of administration actions, whether instituted by next friends of infants or by anyone else, are in the discretion of the Court, and, being in the discretion of the Court, the Court

will deal with them in a proper manner. Thus, if it finds (as for anything I know, it may be found here) that these modified inquiries which we think ought to be made are really unnecessary, Mr Justice *Kay* can make the next friend of the infant and the other Plaintiff pay all the costs, including the costs of the appeal.

I think, having regard to the evidence which we have heard, and above all to the trusts and discretions vested by the will in these gentlemen, the trustees and executors, the view taken by Mr. Justice *Kay* as to that part of the summons which relates to the sale of the real estate was perfectly right. I think he would have been wrong if he had taken any other view; and, in dismissing that part of the summons with costs, in my opinion he did that which was perfectly just and proper. I think, however, he went a little too far in making no order at all, for it may be important—I do not say that it is, but it may be important—that there should be for the protection of the infant and the other parties interested certain limited inquiries. That is possible. Those limited inquiries are or may be essential: it may turn out that they are essential to the due administration of the estate. There will therefore be certain modified inquiries, but at the risk of those who insist upon them, though this need not be expressed in the order. Those inquiries ought then to be directed: if they turn out to have been necessary, beneficial and proper, then those who asked for them will get the costs. If the contrary turns out they will have to pay the costs; and the costs of the appeal, being made costs in the action, will also be in the discretion of the Judge when the action comes on for his reconsideration. The actual form of the order will be mentioned by Lord Justice *Fry*.

FRY, L.J.:—

I am entirely of the same opinion. In my view the recent orders do not entitle the Court to refuse to determine questions which are really raised between persons interested in the estates of deceased testators or intestates. The object of the orders is to prevent the general administration of the estate when the questions in controversy can otherwise be properly determined. If they can be more properly determined by an action brought

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against a third person, probably it would be right to direct them to be settled in that manner. If they can be more properly determined by a limited administration, that is to say, by directing particular inquiries or accounts, then it is the duty of the Court to determine them in that method. But it is not the duty of the Court, in my opinion, to try the questions with the view of ascertaining whether an administration judgment ought to be pronounced; and I am a little apprehensive that in this case the evidence has been directed to the actual trial of the questions, rather than to shewing whether the questions exist.

It must be borne in mind that all these applications are now at the risk of the persons who make them. Order LXV. has provided that the costs of an administration action shall be in the discretion of the Court; and I have no doubt that the Court will know how to exercise that discretion in the present instance, and will ascertain whether the inquiries which we are now about to grant have or have not been beneficial to the estate. If they have, no doubt the Court will allow the costs out of the estate. If it think otherwise, it will know upon whom to saddle the costs of the inquiries. Like Lord Justice *Lindley*, I am not inclined to hold that the mere fact of one of the litigants being an infant requires the Court to pronounce a general administration decree. If that be the view expressed by Mr. Justice *Pearson*, I respectfully dissent from it, and I feel no difficulty as to the point which appears to have created some difficulty in his mind. He says he does not know how he can satisfy himself whether it would be for the interest of the infant that the estate should be administered, or rather whether the estate requires administration. There is an inquiry familiar to us under the old practice in administration decrees, namely, whether the continuation of a particular suit was or was not for the interest of the infant; and such a question, therefore, it appears to me, may, if necessary, be answered before any administration decree is pronounced.

In the present case I think we shall do all that is needful if we direct the following inquiries:—[His Lordship then read, and afterwards handed to the Registrar, certain inquiries as to liabilities of the testatrix's estate, as to sums due to the estate, and

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as to the proceedings necessary to free the estate from liabilities and to get in any moneys outstanding.]

THEIR LORDSHIPS dismissed the appeal with costs so far as the summons related to the sale of the real estate, and directed the costs of the remainder of the summons, both here and below, to be costs in the action.

Solicitors for Appellants: *Horne & Birkett.*

Solicitors for Respondents: *Clarke, Rawlins, & Co.*, agents for *Percival & Son, Peterborough.*

G. I. F. C.

In re LOFTHOUSE, AN INFANT.

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V.-C. B.
March 20, 25, 26.
C. A.
April 29, 30; *May* 20; *June* 3.

Infant—Maintenance—Jurisdiction—Discretion of Trustees.

A female infant was entitled contingently on her attaining twenty-one, or marrying, to a fund of which her deceased mother had been tenant for life. The trustees had power "to apply all or any part" of the income (about £538 a year) for her maintenance and education. On a summons in the matter of the infant, *Bacon*, V.-C., held that he had jurisdiction to control the discretion of the trustees as to the *quantum* to be allowed, and made an order on them to pay £400 a year to the father for her maintenance and education. The trustees appealed, and in answer to an inquiry by the Court stated their intention to allow £250 to the father for her maintenance and education:—

Held, that the order of the Vice-Chancellor was irregular, and must be discharged, the Court having no jurisdiction on a summons in the matter of an infant to make any order for payment by trustees or other persons.

Whether the Court could control the discretion of the trustees as to the amount to be allowed for maintenance and education, so long as such discretion was honestly exercised, *quære.*

SQUIRE RATCLIFFE by his will gave his residuary estate to trustees as to one moiety thereof (subject to previous interests which had determined) upon trust for his daughter for life, and after her death upon trust for such of her children as being sons should attain twenty-one, or being daughters attain that age or marry. The will contained a maintenance clause in these terms: "I empower the trustees or trustee for the time being to apply all or any part of the yearly income of the share or shares to which each or any infant shall be entitled or contin-

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gently entitled in possession under the trusts aforesaid, in or towards the maintenance and education or otherwise for the benefit of such infant during his or her minority."

The daughter married Mr. *Lofthouse* in 1877, and died on the 31st of May, 1879, leaving an only child, *Mary Emmeline Lofthouse*, born on the 10th of May, 1879. The income of the moiety to which the infant was contingently entitled was estimated at £538 5*s.* 3*d.*

In July, 1879, the infant by her next friend took out a summons "In the matter of *M. E. Lofthouse*, an infant," to have an allowance for maintenance, and Vice-Chancellor *Bacon* on the 29th of July, 1879, made in Chambers an order "that the annual income, not exceeding the sum of £538 5*s.* 3*d.* per annum, from the trust funds to which she is presumptively entitled under the will of *Squire Ratcliffe*, deceased, be allowed for the maintenance and support of the said infant as from the 1st of June, 1879, and for the time to come until the 30th of May, 1884, or until further order within that period. And it is ordered that such allowance be paid by *J. Lord* and *J. Leach*, or other the trustees for the time being of the will of the said testator, to *John Lofthouse*, the father and natural guardian of the said infant." . . .

This allowance was assented to by the trustees, who, as they said, considered that as the father was a young man struggling to establish himself in a medical practice, it would be for his daughter's benefit that the whole income should be allowed him for that period.

After the expiration of this period a fresh summons was taken out in the name of the infant by a next friend, "In the matter of *M. E. Lofthouse*, an infant," and it was asked that the payment of the whole income to the father should be continued. This was opposed by the trustees, and the summons was adjourned into Court.

The father, it appeared, had married again, and the trustees thought that he was not sufficiently exerting himself for the maintenance of his family. They at first were unwilling to continue to make him any allowance for the maintenance of the infant, but in Court stated their willingness to allow from £100 to £150 a year.

The summons came on for hearing before Vice-Chancellor *Bacon* on the 20th of March, 1885.

Hemming, Q.C., and *Vennell*, for the trustees:—

It is now settled that where a power is given to trustees, the Court, in administering the estate, will not say: "We, the Court, will exercise the power." The Court will not interfere, unless the trustees have perpetrated some grave wrong. If what the trustees have done is manifestly and absolutely wrong, the Court will annul the act of the trustees, and send the matter back to them to deal with anew: *In re Gadd* (1); *Tempest* v. *Lord Camoys* (2).

Gisborne v. *Gisborne* (3), in 1877, was the turning point in the current of authority. Up to that time the Court had never hesitated to act in the place of trustees; but since then, exercise by trustees of powers vested in them has not been controlled by the Court, except in cases of gross error, or of bad faith.

In the present instance, circumstances have occurred since 1879 which have led the trustees to alter their views. They then thought that the child would be more benefited by putting the whole income into the hands of the father, and they made no opposition to the order directing the £538 to be paid to him. But now they see reason to the contrary. Willing as they were at first to assist an active and energetic man in his endeavour to establish himself in business at *Rochdale*, they now find that it is no longer desirable to pay the whole income to the father. They now think that £100 or £150 a year will be sufficient for the present to meet the requirements of the case.

Marten, Q.C., and *Bardswell*, for the next friend:—

In re Gadd was essentially different from the present. That was a case of an appointment of a trustee; your Lordship appointed the nominee of the next friend, but the Court of Appeal said that the trustee's nominee must be appointed. In substance it was decided that the simple circumstance of an administration by the Court does not oust the power of trustees to appoint.

(1) 23 Ch. D. 134. (2) 21 Ch. D. 571.
(3) 2 App. Cas. 300.

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[BACON, V.C., asked whether the trustees were prepared to make the father an allowance of £300?]

Hemming:—I am not authorized to make any bargain. The trustees are of opinion that £100 or £150 a year will be sufficient.

[BACON, V.C.:—Whatever may be the opinion of the trustees, I must pay regard to the rights of the infant.]

Hemming:—The trustees desire not to abdicate their powers. They hope the Court will not take from them the opportunity of exercising their discretion.

Marten, in continuation:—

The very question here at issue was raised and decided by *Malins*, V.C., in *In re Hodges* (1) on the 14th of February, 1878, after the decision of the House of Lords in *Gisborne* v. *Gisborne* (2) (17 April 1877), though *Gisborne* v. *Gisborne* is not mentioned in the report as having been cited. In *Tabor* v. *Brooks* (3), in which *Gisborne* v. *Gisborne* was cited and considered, the same learned Judge refused to interfere with the discretion of trustees, there being no *mala fides;* but there the words were "in their or his uncontrolled and irresponsible discretion." In *In re Roper's Trusts* (4), where the trustees had not, in the opinion of the Court, exercised a sound discretion, the learned Judge, Mr. Justice *Fry*, controlled and interfered with the discretion. A few days after the decision, on the 1st of August, 1882, in *Tempest* v. *Lord Camoys* (5), came another decision of the Court of Appeal in *In re Weaver* (6), on the 5th of August, 1882, in which a lunatic had two funds, one her absolute property, the other not, and it was held that the trustees had no such discretion as would oust the jurisdiction of the Court to apply the whole of the lunatic's income from the latter fund in exoneration of her absolute estate; and *Gisborne* v. *Gisborne* was distinguished and explained. And in *In re Norris* (7) the Court refused to approve

(1) 7 Ch. D. 754.
(2) 2 App. Cas. 300.
(3) 10 Ch. D. 273.
(4) 11 Ch. D. 272.
(5) 21 Ch. D. 571.
(6) Ibid. 615.
(7) 27 Ch. D. 333.

the appointment of a trustee, though it would not have been invalid if the Court had not been administering the estate. So that there has been no sort of change in the law; the Court, in all instances, acts solely for the benefit of the infant.

Vennell, in reply.

BACON, V.C.:—

This application on the part of the next friend has been very strenuously resisted. The trustees, who have come into Court with an affectation of trying to do the best they can for this infant, who is a ward of Court and under the protection of the Court, desire to cut down the income of the infant very far below that which in the year 1879 they deliberately, with full consideration, and under motives which they now parade as their justification, agreed it was right should be allowed for her maintenance. They, in the plenitude of their generosity, in the "uncontrolled exercise" of their discretion, when the order was applied for on the former occasion, thought that the allowance was not an unreasonable one, and they thought so for reasons which they now set forth to their own honour and glory. There was a young man, left suddenly a widower with one child, struggling to establish himself in a professional career in the town of *Rochdale*, and the trustees thought it was for the benefit of the infant, then one year old (for I do not understand that they intended to make a present to the father—I will not hear them say that in justice to themselves), that the allowance should be such as would enable the father to bring up his child properly. Now has that state of things been changed? Not in the slightest degree. Have their expections been disappointed? Not in the least. The father has struggled and he has succeeded in establishing himself. They say that he has married again and has three other children. Therefore whatever his means were upon the former occasion they must be sensibly diminished in proportion to the burden which his subsequent marriage has cast upon him. So that his means of life are in fact less adequate than they were at that time. Now the trustees say that he ought not to have such an allowance as he asks for, because they say he has become a town

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councillor. I am very sorry to see that feature introduced. I do not desire to dwell upon it, but I cannot help suspecting there is some political animosity at the bottom of this opposition. Whether or not, the trustees reproach this man for having been made a town councillor, and argue that consequently he cannot attend to his business. Anything more absurd or unbecoming I have never heard stated. Apart from the insinuation that the father has derived some benefit from the allowance which he has had for the maintenance of his child, there is not one word of misconduct suggested against him, nor a single act for which he can be reproached. If it was right when the child was only a year old to allow her out of the income £500 a year, is it less so now?

Mr. *Hemming* suggests to me that the Court has no jurisdiction. At first I did not think that he was in earnest when he referred me to the case of *Gisborne* v. *Gisborne* (1) in the House of Lords, for there the trustees had reposed in them an "uncontrollable authority," and their Lordships refused to interfere with that authority. In the other case of *In re Gadd* (2) the next friend and a surviving trustee could not agree about the nomination of a new trustee, and, an order having been made in this branch of the Court, in conformity with what was then the existing practice, adopting the nomination of the next friend, the Court of Appeal reversed the decision. The Court of Appeal took upon themselves to inquire into the propriety of the nomination which the defendant had made, and being satisfied that it was right, they affirmed it. Supposing they had been satisfied that it was wrong, what would they have done? A case more distinctly shewing that the Court has jurisdiction over the subject of such trusts as these can hardly be quoted. But in such a case as this, without going into any question under *Lord Cranworth's Act*, or under the more recent statute, the Court has always possessed jurisdiction over a trust fund and the income of it, and has exercised it for the benefit of the infant.

The case is simply this. An infant ward of Court having made application for the income of property to which she is entitled, asks that an allowance may be made for her maintenance. The

(1) 2 App. Cas. 300. (2) 23 Ch. D. 134.

scheme that is laid before the Court consists of payment of the rent of the house, a payment the propriety of which the trustees themselves recognised on the former occasion, considering that it was being occupied by the father for the benefit of the infant (and I do them the justice to say they do not forget, even when they are reproaching the father for his being a town councillor, to pretend that all they do is for the benefit of the infant), they not only permit, sanction, and approve of the occupation of the house by the father, but they repair it at the expense of the infant's estate. It may be the house is too large for a little girl of only five years of age to live in, but she must live in a suitable house, and if the house is a suitable house for her to ve in, why should she not occupy it? I do not inquire how much she might have to pay for lodgings, furnished or otherwise, in the town of *Rochdale*. But the furniture in the house is her father's, and she has the benefit of her father's presence and protection. She has the further advantage of the society of her stepmother and of her stepmother's and father's children. She has a position which is advantageous in every degree. The only question presented to me is whether the sum or series of sums which the father asks for as the amount of this child's maintenance, is too large. Now the only way in which I can deal with that is by considering that the whole income of this property is something over £500 a year. I cannot say I think it is the right way of dealing with the property of an infant five years old to give the whole of the income for its maintenance, and for this, among other reasons, that as the child grows older the expense of her maintenance and education will increase, and if I proceed at once to the outer limit of income, there will be no opportunity of my increasing the amount when occasion requires. In my opinion that would not be right, but, exercising that power under the discretion which the trustees have, I think it is right to direct them to exercise that power to the extent of paying £400 a year for the maintenance of this infant during her minority with liberty to the next friend to apply whenever he finds it necessary to extend the order or vary it in the interests of the infant.

The trustees will be allowed their costs out of the estate, except that they will not be allowed their costs of summoning

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witnesses whom they have not examined. I consider that to be an abuse of their office. The next friend will also have his costs out of the estate.

The order will be for an allowance of £400 a year as from the 30th of May, 1884, the date of the expiration of the former order.

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1885. March 26. The order made was, "that the sum of £400 per annum be allowed for the maintenance and education of the said infant *M. E. Lofthouse*, and be continued as from the 29th day of May, 1884, during the minority of the said infant, or until further order. And it is ordered that *J. Lord* and *J. Leach*, the trustees of the will, &c., or other the trustees or trustee of the said will, for the time being, do out of the annual income to which the said infant is presumptively entitled under the said will, pay to *John Lofthouse*, the father and natural guardian of the said infant, in manner following the sum of £400, being the income from the 29th of May, 1884, to the 29th of May, 1885, on or before the 29th of May, 1885, and do pay the future allowance of £400 per annum by equal quarterly payments," . . .

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The trustees appealed, and the appeal was argued on the 29th and 30th of April, 1885.

Hemming, Q.C., and *Vennell*, for the appeal:—

We say first, that the trustees have a discretion with which the Court will not interfere unless they refuse to exercise it, or exercise it improperly.

[FRY, L.J.:—You did not appeal against the first order.]

We then thought that it would be for the benefit of the infant that the whole income should be allowed for five years. The order was wrong in form, but it was an order only for a limited time, and our having submitted to it, though wrong in form, cannot take away our discretion after the order has expired. The Vice-Chancellor thought that the Court had a jurisdiction over wards of Court which overrode all discretions in any one else. That is not so: *Brophy* v. *Bellamy* (1).

(1) Law Rep. 8 Ch. 798.

[COTTON, L.J.:—What strikes me is that here there is nothing but a summons for maintenance in the matter of an infant, there being no action or other proceeding pending. How can the Court on such a summons have jurisdiction to order the trustees to make a payment? We will hear the other side.]

Marten, Q.C., and *Bardswell*, *contra*:—

The Judge considered that the allowance the trustees proposed to make was so inadequate that he ought to control their discretion. As regards jurisdiction, this may be treated as a summons under Order LV., r. 3.

[FRY, L.J.:—It is not intituled as it ought to be for that purpose.]

That is mere matter of form.

[FRY, L.J.:—Have you evidence to induce the Court to interfere. If you ask £400 a year and the trustees say £200 is enough, can the Court interfere?]

Yes, if it sees it to be for the benefit of the infant: *In re Hodges* (1). In *In re Roper's Trusts* (2) the Court said that a sound discretion had not been exercised, and it interfered.

[COTTON, L.J.:—It cannot be seen from that brief report what was meant by "sound discretion."

FRY, L.J., referred to the report, 40 L. T. 97.]

[*In re Colgan* (3), and *In re Norris* (4) were also referred to.]

In *Tabor* v. *Brooks* (5) the Court declined to interfere where the discretion given to the trustees was in terms "uncontrolled and irresponsible." Here the testator has used no such words, though he has used the words "uncontrolled discretion" as to postponing the getting in of his estate, which shews that when he meant the discretion to be uncontrollable he said so.

[COTTON, L.J.:—You have, in my mind, to shew that the trustees are not exercising their discretion honestly.]

The cases do not use that expression; if nothing short of dishonesty will do they may be perverse.

(1). 7 Ch. D. 754.
(2) 11 Ch. D. 272.
(3) 19 Ch. D. 305.
(4) 27 Ch. D. 333.
(5) 10 Ch. D. 273.

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[COTTON, L.J.:—Perverseness is dishonesty for this purpose.]

Gisborne v. *Gisborne* (1), where the Court declined to interfere, turned on the expression "uncontrollable authority." The Court in the case of an infant has held itself entitled to see whether the trustees are exercising their power reasonably. There are two classes of cases, one where the power is in the common form, the other where it expresses that the trustees are not to be controlled. In this will we have clauses of both characters, and it would be strong to say that the intention is the same in each case. In *Tempest* v. *Lord Camoys* (2) the distinction is drawn between a pure discretion and a power coupled with a duty.

[COTTON, L.J.:—Does the power mean that the trustees are to apply as much as they think fit, or so much as is necessary and proper?]

Suppose an extreme case, an infant entitled to no other property, could the trustees refuse maintenance and let the child go to the workhouse? In *In re Weaver* (3) the Court controlled the discretion of the trustees.

[COTTON, L.J.:—There was no discretion there as to *quantum*. The whole income belonged to the lunatic.]

In re Gadd (4) was relied on below, but it really supports our case. It shews that the Court will interfere if the trustee is not doing what is proper.

[COTTON, L.J.:—If there had not been this power in the will could the Court have allowed maintenance?]

We submit that it could under *Lord Cranworth's Act* or the *Conveyancing and Law of Property Act*, 1881: *In re Cotton* (5); *In re George* (6).

Hemming, in reply:—

I apprehend that if this power had not been contained in the will maintenance might have been allowed by the trustees, but

(1) 2 App. Cas. 300.
(2) 21 Ch. D. 571.
(3) Ibid. 615.
(4) 23 Ch. D. 134.
(5) 1 Ch. D. 232.
(6) 5 Ch. D. 837.

I contend that that does not vary the case. Neither of the Acts gives the Court any additional power, they only write a power of maintenance into the instrument.

[COTTON, L.J.:—Is the power to apply so much as the trustees think fit, or so much as is requisite?]

If a power is given to apply the whole or a part there must be a discretion in the donee of the power. How can "I empower them to apply all or any part" be construed to mean "I order them to apply such part as the Court shall think proper?" There is no case to be found where a power was held not to imply a discretion. Where a power is purely discretionary the Court will not interfere for nonfeasance. If it is so expressed that the trustees are bound to exercise it, still their discretion is not taken away. The Court will compel them to exercise it, but will not take it from them and exercise it. The Vice-Chancellor entirely overrides the discretion of the trustees. There is not a word in *Gisborne* v. *Gisborne* (1) to shew that the decision would have been otherwise if the words emphasizing the discretion had been omitted, although those words of emphasis were no doubt dwelt upon, and *Tempest* v. *Lord Camoys* (2) and *In re Gadd* (3) dispose of the suggestion that *Gisborne* v. *Gisborne* only applies where there are express words making the discretion uncontrollable.

May 26. The case stood for judgment, when Lord Justice *Cotton*, said:—

Mr. *Hemming*, we are prepared to give judgment, but it may prevent disagreements in the family and possibly future litigation, if you would state what allowance your clients are prepared to make.

Hemming:—I should wish to consult my clients. I may add that it would greatly help them if your Lordships would state your view of the principles which ought to guide them in coming to a conclusion.

(1) 2 App. Cas. 300. (2) 21 Ch. D. 571.
(3) 23 Ch. D. 134.

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COTTON, L.J.:—

I think I am expressing the opinion of the rest of the Court as well as my own in saying, that the trustees in exercising their discretion must consider what is most for the benefit of the infant. In considering that, they should take into account that the father is not of sufficient ability properly to maintain his child, and that it is for her benefit not merely to allow him enough to pay her actual expenses, but to enable him to give her a better education and a better home. They must not be deterred from doing what is for her benefit because it is also a benefit to the father, though, on the other hand, they must not act with a view to his benefit apart from hers.

On the 3rd of June the case was again placed in the paper, and *Hemming* stated that the trustees were willing to allow £250 a year to the father.

COTTON, L.J.:—

We all think that the offer which is now made by the trustees is a very proper one, and we hope it will prevent any further difficulty between these parties. Our desire to prevent any ill feeling was the ground why we did not give judgment, and as we think that the sum proposed is a proper sum to be allowed, it is not now necessary for us to do so, except as regards one point. The order appealed from was an order ordering the trustees, out of the income in their hands, to pay a sum of £400 a year for the maintenance of the infant. Such an order could not be made on such a summons as this, which was merely a summons in the matter of an infant. It is quite right for the Court on such a summons to appoint guardians, or to advise trustees what sum can be properly allowed for the maintenance of the infant, but the Court has no jurisdiction as against trustees, or as against any one else, on such a summons, except where there is a contempt of Court. This order was one that could only be made in a suit constituted either by an originating summons, or by writ, so as to make it an ordinary action. Under those circumstances, the order made was an irregular one, and whatever view we might have taken as to our power to interfere with the discretion of the

trustees, we must have discharged the order as having been made irregularly and without jurisdiction.

Marten asked that the costs of the infant might be provided for. He stated that two witnesses had been brought up to town for cross-examination at the request of the trustees.

COTTON, L.J. :—I do not think that we can give you any costs. You obtained an order in a proceeding in which there was no jurisdiction to make it. Persons must understand that when they come to the Court to get an order, they must come in a proceeding which gives the Court jurisdiction to make it. It seems to be thought now that if parties come before the Court without any action or proceeding which gives the Court adverse jurisdiction, they can get any order which they could have obtained in a duly constituted suit.

BOWEN, and FRY, L.JJ., concurred.

Some discussion then took place as to the form of the order, and it was suggested that the opinion of the Court that the £250 was a proper sum should be expressed; to which *Hemming* objected, referring to *Gisborne* v. *Gisborne* (1). Ultimately it was settled that the order should be:—The trustees stating their intention for the present to allow £250 a year to the father for the maintenance and education of the infant from the expiration of the former order, discharge the order of the Vice-Chancellor without costs. The trustees to be at liberty to retain their costs out of any income, after providing for the £250.

Solicitors for the trustees: *J. J. & C. J. Allen.*
Solicitors for the Respondent: *Jaques, Layton, & Co.*

(1) 2 App. Cas. 300.

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1885
June 5.

In re HUBBACK.
INTERNATIONAL MARINE HYDROPATHIC COMPANY *v.* HAWES.

[1883 H. 4497.]

Executor—Right of Retainer—Company— Liquidator—Contributory—Balance Order—Administration—Priority—Companies Act, 1862, *ss.* 75, 76, 103, 105, 106 [*Revised Ed. Statutes, vol. xiv., pp.* 219, 220, 225]—*Gen. Ord. Nov.* 1862, *r.* 35 ; *Sched. III., Form* 39.

Where under sects. 76 and 103 of the *Companies Act*, 1862, and Rule 35 of Gen. Ord. Nov. 1862, a balance order has been obtained by the official liquidator of a company against the legal personal representative of a deceased contributory for payment of a call made after the death, the order being in accordance with Form 39 in Sched. III. to the Gen. Ord., and directing the legal personal representative to pay the call "out of the assets of the deceased in his hands as such legal personal representative to be administered in due course of administration," such an order is not in the nature of a judgment so as to constitute the liquidator a judgment creditor: it is to be treated simply as analogous to a common administration judgment, or as a step to the administration judgment which may be obtained by the liquidator under sect. 105 of the *Companies Act*, 1862, and which is his proper remedy in case the legal personal representative has failed to comply with the order; and therefore the order, whether followed by an administration judgment or not, leaves untouched all priorities and rights usually existing in the due course of the administration of the estate of a deceased person, including an executor's right of retainer. Thus, the order, if obtained against executors, does not give the liquidator priority over a debt due to one of them from the testator, and therefore retained by that executor out of the assets, even though the order be prior in date to notice of the retainer.

One of several executors is entitled to a right of retainer in respect of a mortgage debt due from the testator to a body of trustees of whom that executor is one.

Decision of *Bacon*, V.C., reversed.

Adjourned summons.

In April, 1883, an order was made by the Court of Chancery of the County Palatine of *Lancaster* for the winding-up of the *International Marine Hydropathic Company, Limited*, and in August, 1883, *Joseph Hubback*, the testator in the above action, was settled on the list of contributories for 150 shares.

On the 6th of September, 1883, *Hubback* died, having by his

will appointed as executors the Defendants, *Alexander Travers Hawes* and his widow, *Georgina Hubback*.

On the 27th of September, 1883, an order was made in the winding-up for a call of £3 per share. This order was sent by the liquidator by post to *Hubback's* address in the company's books, indorsed with a demand on *Hubback* for £225, as being the amount due from him in respect of the call. A few days afterwards the liquidator applied to *Hubback's* executors for payment, but as they disputed the claim, the company on the 10th of October, commenced this action—a creditors' action—in the Chancery Division of the High Court, against the executors for the administration of their testator's estate; and on the following day the liquidator obtained leave from the Palatine Court to continue the action.

On the 16th of October a balance order was made by the Palatine Court in the winding-up, upon the application of the liquidator, that "*Georgina Hubback* and *A. T. Hawes*, the legal personal representatives of *Joseph Hubback* of &c., deceased, a contributory of the said company, do, on or before the 20th day of October, 1883, or within four days after the service of this order pay to Mr. &c., the official liquidator of the said company at his office at &c., the sum of £225 out of the assets of the said *Joseph Hubback*, deceased, in their hands as such legal personal representatives as aforesaid, to be administered in a due course of administration, if the said *G. Hubback* and *A. T. Hawes* have in their hands so much to be administered." The order then went on to direct payment to the liquidator by the other contributories named in the schedule thereto of the amounts due from them in respect of the call made by the order of the 27th of September.

This order was served personally on the Defendant *Hawes* on the 18th of October, and on the other executor on the 3rd of November.

On the 24th of October the Defendant *Hawes* gave the liquidator notice that he had exercised his right of retainer as executor in respect of a sum of £306 10*s.* due to himself and two other persons named *Cartwright* and *Bell*, as trustees, from the estate of the testator, and that there were no assets of the testator whatever. This £306 10*s.* was the unpaid balance of a mortgage

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debt of £4500 which had been secured to the Defendant *Hawes* and his co-trustees, *Cartwright* and *Bell*, by transfer to them of a freehold mortgage executed by the testator in June, 1882.

On the 9th of November, 1883, administration judgment was pronounced in the action, accounts and inquiries being directed as to the testator's debts and outstanding personal estate; and on the 6th of May, 1884, the Chief Clerk made a certificate, whereby he certified that the Defendants, the executors, had received personal estate of the testator to the amount of £368 18*s.* 4*d.*, and that there was a balance due from them of £306 10*s.*, being in fact the mortgage debt retained by the Defendant *Hawes*, and which retainer the Chief Clerk disallowed.

The Chief Clerk further certified that the £225 was due as a debt from the testator's estate to the official liquidator of the Plaintiff company.

On the 13th of May, 1884, the present summons was taken out on behalf of the Defendants, the executors, to vary the certificate, by disallowing the debt of £225 certified to be due to the official liquidator, and by allowing the item of £306 10*s.* to the executors as a disbursement.

The summons was heard before Vice-Chancellor *Bacon* on the 21st of June, 1884.

Marten, Q.C., and *J. S. Parkin*, for the summons:—

Not only has an executor a right to retain in respect of his own debt, but an executor who is also a trustee has a right to retain in respect of a debt due to the trust estate: *Sander* v. *Heathfield* (1); *Williams* on Executors (2), and the cases there cited.

Moreover, if an executor is a joint creditor with others, he may retain in respect of the joint debt: *Crowder* v. *Stewart* (3).

Thus the whole case is covered. The executor, whether as co-trustee or joint creditor, is entitled to retain this debt.

S. Hall, for the official liquidator:—

An executor can only retain as against a debt of equal degree.

(1) Law Rep. 19 Eq. 21. (2) 8th Ed., p. 1045.
(3) 16 Ch. D. 368.

My debt is a judgment debt, and therefore higher in degree than the mortgage debt; and, moreover, the order creating my judgment debt was obtained before the executor had set up any right to retain. The executor cannot retain against debts of a higher degree than his own: *Williams* on Executors (1). Deficiency in a mortgage security to pay the mortgage debt is payable only out of the general assets.

Marten, in reply:—

Even if the order does create a judgment debt, it is not a judgment debt of the testator, but only of the executors, and therefore does not destroy the creditor-executor's right of retainer.

BACON, V.C.:—

I think there can be no reason to doubt that the balance order was in effect a judgment against the estate of the testator in the hands of the representative.

If the representative had possessed any right to retain, and if he had exercised that right before the order was made, a different state of things might have existed. There is no doubt, in my opinion, that from the date of this balance order the executors were bound to obey it, and to apply the estate in satisfaction of the debt created by that order.

The right of retainer in the cases which have been referred to is perfectly clear. In the present case, the executor, having been served with the balance order, and having in his hands money enough to satisfy the exigencies of that order, informs the judgment creditor that he retains the money for himself in payment of a debt due to himself, and says he has a right to hold it for his own benefit, he being a creditor by specialty, against a judgment debt.

In my opinion, the claim to a right of what is called retainer cannot be in any sense an answer to the finding of the Chief Clerk's certificate, that the executors had in their hands this sum

(1) 8th Ed., p. 1044.

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of £306 10*s.*, and were bound to apply it in discharge of this judgment debt.

The summons must be dismissed with costs.

The Defendants appealed. The appeal was heard on the 5th of June, 1885.

Marten, Q.C., and *J. S. Parkin*, for the Appellants:—

The question is whether the balance order gives any priority to the liquidator. The order is in the statutory form—Form 39 in Sched. III. to Gen. Ord., November, 1862, under the *Companies Act*, 1862, and was made in pursuance of sect. 105 of the Act, which says that "If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal and real estates of such deceased contributory, or either of such estates, and of compelling payment thereout of the moneys due:" the representatives of a deceased contributory being by sect. 76 substituted for him so far as regards liability. The balance order confers no priority: it is nothing more than an order to pay out of the assets in a due course of administration, being equivalent to an administration judgment, which does not oust an executor's right of retainer. The debt due from us as contributories is, according to sect 75 of the *Companies Act*, 1862, a specialty debt only, and its character is not altered by this order, which is not a final judgment, but only part of a statutory proceeding for the purpose of winding up the affairs of the company: *Ex parte Whinney* (1).

[BOWEN, L.J.:—That case only applies to the particular phrase "final judgment," as used in the *Bankruptcy Act*, 1883.]

The order is, in fact, not a judgment at all, for no execution can issue upon it as in a "judgment of assets" at law against executors: *Chitty's* Forms (2). This is merely a statutory form of order for payment; the remedy for non-compliance with which is administration under sect. 105. We rely on the direction in

(1) 13 Q. B. D. 476. (2) 12th Ed., p. 542.

the order that the assets are "to be administered in due course of administration:" for "in due course of administration" the executor's right of retainer in priority to other creditors must be admitted.

Millar, Q.C., and *S. Hall*, for the Liquidator:—

We have taken all the steps directed by the *Companies Act*, 1862, sects. 103 and 105, to enforce our claim, for we not only obtained this balance order in the winding-up, following the form of order prescribed by the rules under the Act, but also obtained an administration judgment against the executors. The balance order is a judgment to all intents and purposes, and therefore gives us priority as a judgment creditor; and as this judgment was obtained before the date of the administration judgment, our priority is not taken away by *Hinde Palmer's Act* (32 & 33 Vict. c. 46), the rule being that the creditor who first takes legal proceedings against the legal personal representative of the debtor, and obtains judgment, is entitled to priority: *In re Williams' Estate* (1); *In re Stubbs' Estate* (2); *Crowder* v. *Stewart* (3); and that priority is not affected by sect. 10 of the *Judicature Act*, 1875: *In re Maggi* (4). An executor's right of retainer, has not, it is true, been abolished by *Hinde Palmer's Act*, but neither has it been enlarged by that Act so as to enable the executor to retain his debt as against a creditor of a higher degree than himself: *Wilson* v. *Coxwell* (5). Now a judgment creditor is a creditor of a higher degree than an executor to whom a debt is due from a testator on specialty or simple contract; and that we are in the position of a judgment creditor is clear from sect. 18 of the *Judgment Act*, 1 & 2 Vict. c. 110, which says that decrees and orders of Courts of Equity shall have the effect of judgments, a provision which is extended to orders of the Palatine Court by sect. 2 of 18 & 19 Vict. c. 15.

[FRY, L.J.:—We have nothing to do with the *Judgment Acts*: they say nothing about the right of retainer.]

But sect. 18 of the first mentioned Act is precise: it consti-

(1) Law Rep. 15 Eq. 270.
(2) 8 Ch. D. 154.
(3) 16 Ch. D. 368, 371.
(4) 20 Ch. D. 545.
(5) 23 Ch. D. 764.

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tutes us a judgment creditor and so gives us priority, and there is nothing in the *Companies Act*, 1862, affecting the question as to the mode in which the law applies insufficient assets. The order of priority of debts where the assets of a deceased person are insufficient is given in *Seton* on Decrees (1), where it is stated that judgments recovered against the executor or administrator, he having notice of them, rank fourth, and debts by specialty or simple contract sixth. Here the executor, *Hawes*, had notice of the balance order before he exercised his right of retainer.

[COTTON, L.J.:—What is the object of sect. 105 of the *Companies Act* if it does not point out the particular remedy against an executor who is made a contributory.]

It may be doubted whether that section is not intended solely for the protection of the legal personal representative where an order for payment has been made upon him. However, the section, in saying that proceedings may be taken for administering the estate of the deceased contributory, leaves the question of priority open and does not in any way control it; and if, in a common administration action the assets are to be administered as stated in *Seton*, the section, in the case of an administration under it, merely lets in the ordinary rules as to priority and does not exclude them. Here the executor cannot be a creditor of a higher degree than we are, for he is a mere assignee or transferee of a specialty debt. And even if he were of equal degree, we should be allowed priority, having used the greater diligence; for the rule is that, in an administration action, among creditors of an equal degree, the creditor who has used diligence in being the first to obtain judgment on his debt is allowed the precedence: *Williams* on Executors (2); *Dollond* v. *Johnson* (3).

COTTON, L.J.:—

This is an appeal from Vice-Chancellor *Bacon*, who refused to allow the executors to retain a sum of £306 10*s.* in respect of a debt due to one of them, as against the Plaintiff, who is the official liquidator of a company now in course of being wound

(1) 4th Ed., p. 815. (2) 8th Ed., p. 1003.
(3) 2 Sm. & Giff. 301.

up; and but for the fact that the official liquidator has obtained a balance order the retainer would, undoubtedly, be right. It is established that one of several executors, if a creditor, may retain, just as if all were creditors, on this ground, that if one executor is a creditor, as an executor cannot sue himself, there is nobody who can sue, and he will therefore be placed at a disadvantage if he cannot get that priority which another creditor by suing can get.

In the present case it is said this balance order is a process taken by another creditor which gives him priority—that it is a judgment obtained by the official liquidator, and therefore there can be no retainer by the executor, though the liquidator is certainly not a judgment creditor of the testator. Now the right of retainer is only against debts of equal degree. Is then the official liquidator a creditor of a higher degree than the executor who claims the right of retainer, or only a creditor of equal degree? Let us see what the order is. It is one made under certain clauses of the *Winding-up Act*, to which I will presently refer; and it is this—that the legal personal representatives do pay to the official liquidator the sum of £225 out of the assets of the said *Joseph Hubback*—he was the deceased contributory—in their hands as such legal personal representatives as aforesaid, to be administered in a due course of administration if the executors have in their hands so much to be administered. The order points therefore to administration "in a due course," and is no order for payment except out of the assets and in a due course of administration. What was the judgment which a creditor would have got as against executors so as to obtain priority and prevent the right of retainer? He would have got a judgment for a certain amount to be levied on the goods and chattels of the testator, which were at the time of his death in the hands of the executor to be administered, if they had so much in their hands to be administered. If a writ under that judgment were put into the hands of the sheriff, he would be ordered to levy for so much of the goods of the testator in the hands of the executors. The sheriff would, therefore, under that judgment, seize everything which he had reason to believe were the goods of the testator, though of course he would do so at his peril, for if he

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seized goods which were not the goods of the testator he would be liable to an action by the person whose goods he had seized. But here the case is different. The debt is to be paid out of the assets of the testator to be administered in a due course of administration. That is an order of an entirely different kind, and the writ which, under an ordinary judgment against an executor, would be put into the sheriff's hands, would be inapplicable here. It is not a judgment directing a sum to be paid out of the assets not yet administered, but it is an order to pay a sum out of the assets to be administered in a due course of administration. In my opinion that is an order on which there could be no writ which the sheriff could properly act under. It is not simply an order for the payment of money; nor for money to be levied out of the goods of the testator; but it is an order for payment out of the assets to be administered in a due course of administration.

When one comes to look at the provisions of the *Companies Act*, it is clear this order cannot be considered such a judgment against executors as would prevent them from exercising their right of retainer: in other words this is not such an order as would give priority, as against other creditors in the same degree, to the person who obtained it. Sect. 75 declares what is the nature of the liability of a contributory in respect of the sums he has to pay; the debt is to be equivalent to a specialty. Then sect. 76 says: "If any contributory dies either before or after he has been placed on the list of contributories"—here it was after—"his personal representatives, heirs, and devisees shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly." There it says expressly that their liability shall be to contribute in a due course of administration. Then, under sect. 102, the Court may make calls.

Then we come to the 103rd section, which authorizes a balance order to be made: "The Court may order any contributory, purchaser, or other person from whom money is due to the company to pay the same into the *Bank of England* or any branch thereof to the account of the official liquidator instead of to the official liquidator, and such order may be enforced in the same

manner as if it had directed payment to the official liquidator." Then sect. 105 says: "If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal and real estates of such deceased contributory, or either of such estates, and of compelling payment thereout of the moneys due." Then sect. 106 says: that the order is to be conclusive evidence in all proceedings that the amount is due. If the balance order was a judgment in the ordinary sense one would not much expect to find this last provision, but there is also an exception in that section that in proceedings for administering the real estate the order is to be only *primâ facie* evidence for charging the real estate. Here, when the balance order was made, the executor would not have been permitted to come and say: "I plead I have fully administered. I have retained. I have paid debts of higher degree:" for the answer would have been this: "The only order asked against you is an order that this sum shall be paid out of the assets to be administered in a due course of administration; and if you can satisfy the liquidator that it would be utterly useless to go on administering the assets in a due course of administration, then he will take proceedings at his peril." Therefore the executor would not have the opportunity that he would have at law before judgment was obtained against him, of pleading that he had retained, and therefore had administered, and had done what he had a right to do. Where the executor has had the opportunity at law of pleading *plene administravit*, and it is shewn that he has falsely so pleaded, then, probably, the judgment is, as to debt as well as costs, against the executor personally if he has not sufficient assets of the testator. I need not, however, discuss that, for in such a case as the present there is no opportunity of pleading *plene administravit*, no opportunity of pleading the retainer, and nothing requiring the executor to exercise his right of pleading before the order is made.

Having regard to the form of the balance order itself, it is clearly not an order that can give the creditor under it priority so as to put him in a position to say: "I am now to be preferred by my diligence to creditors who at the death of the testator were

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in the same position as myself." It is simply an order putting him in a position to obtain payment in due course of administration, and it gives him the right pointed out under sect. 105 of enforcing payment, if the executor does not pay, by taking proceedings to administer the estate of the deceased contributory.

An ingenious argument was put to us by Mr. *Hall*, who argued this case very well: that the 105th section was meant to relieve the personal representatives of the deceased contributory from difficulty; and it was suggested that there could be no administration of the estate at the instance of the liquidator, and that all the section meant was to give the personal representatives a right to be indemnified. But, in my opinion, the section does point out what is the remedy of the liquidator, where such an order as this has not been complied with, and where there is no writ which can be put into the hands of the sheriff to seize the goods of the testator. It appears to me, therefore, that this order is not such a judgment against the executor as to give the liquidator a priority in the administration of the assets which he did not previously possess, or to stop the right of retainer which, but for the order, the executor would undoubtedly have had. In my opinion the appeal must be allowed and the decision of the Vice-Chancellor reversed.

BOWEN, L.J.:—

I am of the same opinion, and I should not add a single word if it was not for the usual practice of this Court, when it differs from the Court below, that each member of the Court should say shortly what his view is, for it seems to me that Lord Justice *Cotton* has said everything that could possibly be said upon the subject. The form of the balance order appears to me to be decisive of the whole question. The executor's right of retainer would be unimpeachable were it not for this order. What, then, is the true effect of the order? It is not a judgment *de bonis testatoris*. It certainly is not a judgment at law; nobody says that. It is not, if you look at it carefully, such an order to pay a definite sum of money out of assets as would be equivalent to a judgment *de bonis testatoris*. To shew the difference between the orders made against the legal personal representative by the Court of Equity and by the Court of Law, we must compare the two. Let

us see what is the form of a judgment at law *de bonis testatoris*. The form of a judgment *de bonis testatoris* is given in *Williams' Saunders* (1). There the judgment says that the whole amount is to be levied on the goods and chattels which were at the time of the death of the deceased person in the hands of the administratrix, if she has so much in her hands to be administered, and if not, then, &c. Compare that with the form under the *Companies Act* of an order for payment. This form contains words of a different character. Payment is to be made out of the assets in the hands of the personal representatives "to be administered in a due course of administration." How could you issue a writ of execution on that? Supposing one was to try to frame the writ of *fi. fa.* upon that order; an ordinary writ of *fi. fa.* would be fatally at variance with the order, because either it would be necessary to introduce into the writ of *fi. fa.* the words "to be administered in a due course of administration"—which would have the absurd result of throwing the whole burden of administering the estate on the sheriff—or else, if the words were left out, the writ would not correspond in a vital point with the order which it is now contended is equivalent to it.

The form of the order is conclusive. It is not an absolute order to pay a sum of money, as Lord Justice *Cotton* has pointed out. Supposing an action had been brought against the executor he would have pleaded existing debts and retainer—*plene administravit*. This order is a special order which would be made without giving him any opportunity of setting up the retainer. If he took that objection to the order he would be told "you are objecting to an order that does not hurt you, because you are safe by the form of it." That is only putting in another manner, and in a more striking light, the answer to the liquidator's contention, namely, that he is not entitled to enforce an order of this special form as an absolute order to pay money, or to issue execution upon it, and that, therefore, the right of retainer is not destroyed.

FRY, L.J.:—

I am of the same opinion. I think the whole question may be determined upon the form of the order, which correctly expresses

(1) Vol. i. p. 336 a.

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the position and the rights of the parties; and, therefore, although I am stating the conclusion I arrive at on the form of the order, I am stating it really on the substance of the case.

It was pointed out by my learned Brethren that this order is of a very peculiar description. It directs payment by the executors out of the assets of the testator "in their hands as such legal personal representatives as aforesaid, to be administered in a due course of administration." Those words, "to be administered in a due course of administration," appear to me to preserve all the priorities and all the rights which would have existed if the order had not been made. In that point of view it appears to me that this order is analogous to the old administration decree and the present administration judgment, a form of judgment which it is notorious does not affect the right of retainer of the executor. Why does the administration judgment not affect the right of retainer? Simply because it leaves unaffected all the priorities and all the rights which exist in due course of administration. The form of order under discussion has exactly the same result, and leaves all the rights untouched. In my judgment it is a perfectly correct form of order, when you look at the substance of the case. So soon as a person has been entered on the list of contributories this order follows as a matter of course; and it appears to me that, having regard to the 35th rule of the General Order of November, 1862, it would have been impossible for the executor, if he had appeared before the Judge in Chambers on the making of this order, to have successfully resisted it by shewing that he had fully administered the estate, and that he claimed the right of retainer. The answer would have been "you have fully administered the estate, and your right of retainer will never be interfered with by the order which is now going to be made:" and, further, the 35th rule does not allow of such a point being raised at that stage.

There is another way in which the same result may be arrived at. I have asked myself—as we have all asked ourselves—what possible mode is there of gaining the benefit of this order except that which is pointed out by the 105th section? Although Mr. *Millar* and Mr. *Hall* have both assisted us to the utmost of their power and ability, they have failed to point out any mode in

which execution could have been had on such an order as this —I mean execution of *fieri facias*—any mode in which the benefit of the order could have been reaped in any other manner than by administration of the estate. If that be so—and that is my conclusion—the matter stands thus: this order is only a step towards administration judgment: an administration judgment does not deprive the executor of the right of retainer. It follows, therefore, that a step towards administration judgment cannot possibly deprive him of that right; in other words, this order provides for the due administration of the estate; and in the due administration of the estate the executor has the right to retain. In my opinion the appeal must be allowed, and with costs.

Solicitors: *Baker, Blaker, & Hawes; Pritchard, Englefield & Co.*

G. I. F. C.

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[1883 W. 1615.]

Mortmain—Bequest to Charity—Interest in Land—Mortgage of Interest of Cestui que trust in Funds invested partly on Mortgage of Real Estate—Apportionment—9 Geo. 2, c. 36, s. 3 [Revised Ed. Statutes, vol. ii., p. 403].

A testator was entitled to £800, secured by mortgage of the life interest of a widow lady in the funds held on the trusts of her marriage settlement, and the reversionary interest of one of her children in the same funds. At the date of the mortgage and of the testator's death, part of these funds was pure personalty, and the rest was invested under a power in the settlement on mortgage of real estate. The testator bequeathed to charities such part of his residuary estate as could by law be so bequeathed:—

Held, that the £800 was an interest in land within the meaning of 9 Geo. 2, c. 36, s. 3, and could not be given by will to a charity, and that there could not be any apportionment so as to make a part of the sum available for charity.

Brook v. *Badley* (1) approved and followed.

Observations of *Jessel*, M.R., in *In re Harris* (2) explained.

THIS was an appeal by the Plaintiff, the treasurer of a charity, from a decision of Mr. Justice *Pearson* (3).

(1) Law Rep. 3 Ch. 672. (2) 15 Ch. D. 561.
(3) 27 Ch. D. 318.

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A testator had bequeathed to charities such part of his residuary estate as could by law be bequeathed for charitable purposes. Part of his estate consisted of a sum of £800 secured to him by a mortgage by *Maria Smith*, widow, and one of her two children, of their interests under Mrs. *Smith's* marriage settlement; and of a sum of £200 secured to him by a mortgage by Mrs. *Smith* and her other child of their interests under the same settlement. At the time of the execution of the mortgages, and at the testator's death, part of the settled funds was invested on mortgage of real estate, which was authorized by the settlement, and part was pure personalty. Mr. Justice *Pearson* held that, as the two mortgages together comprised the whole of the settled funds, the testator had under them an interest in real estate, and that the £800 and £200 could not go to the charities. The appeal was heard on the 5th and 8th of June, 1885.

Cozens-Hardy, Q.C., and *Vernon Smith*, for the Appellant:—

The question turns on 9 Geo. 2, c. 36, s. 3.

[FRY, L.J.:—How do you make out that the testator had not an interest in land?]

We rely on the doctrine of *Jessel*, M.R., in *In re Harris* (1), that the land must be affected directly. This he considered to be established by *Attree* v. *Hawe* (2), where the Act and the cases were fully gone into by the Court of Appeal. In *Ashworth* v *Munn* (3) it was held that a bequest to charity of a share in a partnership which had land, was void as regarded what arose from the sale of the land. But there the executors of a deceased partner would have a right to a receiver, and a lien on the land for the amount of his share, that is, a direct interest in land.

[COTTON, L.J.:—That case seems to me to lay down that the question is whether the testator has an interest in land. We ought not, I think, to enter into refined distinctions as to the nature of his interest.]

The testator in this case could not have gone to the trustees and said, "Transfer the mortgage to me." He had no power of dealing with the mortgage.

(1) 15 Ch. D. 561. (2) 9 Ch. D. 337.
(3) 15 Ch. D. 363.

[FRY, L.J.:—Is not this case very like *Thornton* v. *Kempson* (1).]

Attree v. *Hawe* (2) alters the law. In *Jervis* v. *Lawrence* (3) Vice-Chancellor *Bacon* takes the same view of *Attree* v. *Hawe* as was expressed by *Jessel*, M.R., in *In re Harris* (4), viz., that it lays down that the charge on the land must be direct, and he decided that the giving a power of distress did not make the mortgages there in question an interest in land. In *In re Robson* (5) a sum of money partly payable out of land was held well given to charity, because no direct interest in land was given. That case shews that a gift of money will not be hit by the statute, merely because by some legal proceedings the payment of it out of land could be obtained. *Marsh* v. *Attorney-General* (6) is a case which supports the view that only a direct interest in land is struck at.

Assuming the Court to be against us on that point, there ought to be an apportionment, for the debts were partly secured on pure personalty.

[THE COURT referred to *Brook* v. *Badley* (7) as bearing both on this and on the main point.]

As regards the question of interest in land, the legacy there had been assented to, and the legatee had a direct claim against the land out of the proceeds of which along with the personalty it was to be paid. The whole sum was directly charged on land, so that the case is no authority against us on the apportionment point. It would be a whimsical result if a bequest by the mortgagors of the mortgaged interests to a charity would have been good *pro tanto*, but a bequest of the interest of the mortgagee of them wholly void. *In re Hill's Trusts* (8) is in point.

Yate Lee, for the Defendants:—

On the question of apportionment *Brook* v. *Badley* is precisely in point, and the Court will not overrule it.

(1) Kay, 592.
(2) 9 Ch. D. 337.
(3) 22 Ch. D. 202.
(4) 15 Ch. D. 561.
(5) 19 Ch. D. 156.
(6) 2 J. & H. 61.
(7) Law Rep. 3 Ch. 672.
(8) 16 Ch. D. 173.

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Cozens-Hardy, in reply :—

[BAGGALLAY, L.J. :—Is there any case relating to a debt secured both on realty and personalty ?]

Fox v. *Lownds* (1) is very near it, and is in favour of apportionment; but there is no case precisely in point. In *Ashworth* v. *Munn* (2) it is laid down that the decision of a Lord Chancellor is not absolutely binding, and I ask the Court to say that Vice-Chancellor *Malins* was right in *In re Hill's Trusts* (3), and that the decision in *Brook* v. *Badley* (4) was erroneous.

COTTON, L.J. :—

This is an appeal from a decision of Mr. Justice *Pearson*, the question being whether two sums of £800 and £200, secured as I am going to mention, could be given by will for charitable purposes. The £800 was secured on a mortgage given by a tenant for life and one of the persons entitled in remainder, of their interests under a settlement which contained a power to invest the trust funds on real security. At the death of the testator part of the trust funds was so invested and part was not. The £200 was secured on a similar mortgage by the same tenant for life, and another of the persons entitled in remainder, of their interests in the same trust fund. Whether all persons interested in the trust funds were parties to the mortgages I do not think material.

We must first look at the statute. It is often argued that a case is not within the mischief indicated by the preamble, and that therefore it must be considered to be out of the Act. This is not sound reasoning—the preamble may be usefully called in where the enacting words are ambiguous, but where they are clear they cannot be cut down by reference to the preamble. Now the statute 9 Geo. 2, c. 36, s. 3, enacts "That all gifts . . . of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments," shall be null

(1) Law Rep. 19 Eq. 453.
(2) 15 Ch. D. 363.
(3) 16 Ch. D. 173.
(4) Law Rep. 3 Ch. 672.

and void if made in any other manner or form than is directed and appointed by the Act. To say that under the gift now in question the charity could never obtain possession of the land, is attempting to draw us aside from the consideration of the real question, which is whether an interest in land is attempted to be given. Part of the property held on the trusts of Mrs. *Smith's* marriage settlement was invested on mortgage of land, it is therefore impossible to say that the *cestuis que trust* had not an interest in land. It is true that they were not the persons to enforce the mortgage, but the question whether they have not a specific interest in that mortgage must be answered, and in my opinion it clearly must be answered in the affirmative. Having then an interest in the mortgage they had an interest in land. Mr. *Cozens-Hardy* conceded that a mortgagee of the interest of a *cestui que trust* must for this purpose stand in the same position as the *cestui que trust*. Looking, then, at the case apart from authority, I think that a mortgage by some of the *cestuis que trust* of their interests under a settlement, the funds subject to which are invested on mortgage of land, confers an interest in land, and therefore cannot be bequeathed to a charity.

It is said, however, that the authorities support the contrary view, and reliance was placed on *Attree* v. *Hawe* (1). The question there was whether debenture stock gave the holder an interest in land, and the Court of Appeal held that it did not—but on what principle? The principle is shewn by the last sentence of the judgment (2): "The result is that the debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement, or hereditament, or any interest in land, tenement, or hereditament, or charge or incumbrance affecting land, tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is." There were expressions in the judgment delivered by Lord Justice *James* in that case, which he afterwards, in *Ashworth* v. *Munn* (3), said were not applicable to anything the Court had then to decide, and were expressed inadvertently. What the case decided

(1) 9 Ch. D. 337. (2) 9 Ch. D. 351.
(3) 15 Ch. D. 363, 368.

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was that a charge on the profits of a going concern is not an interest in land. The holder of debenture stock of a corporation or of a joint stock company cannot wind up the corporation to enforce his charge, nor can he in any manner attach the land, he can only realize his security by selling it in the market, the body being considered as continuing without limit. So also a shareholder in such a company can only sell what he has, his right to a share in the net profits of a continuing concern. In *Ashworth* v. *Munn* (1), which was the case of an ordinary partnership, the distinction was pointed out, that the question is not whether the testator or legatee could get possession of any land, but whether he had an interest in or a charge on land.

The case of *In re Harris* (2) has really no bearing on the present case. What was relied on was an expression by the late Master of the Rolls that the statute did not apply to an interest which did not directly affect land. To say that only a direct interest in land is hit by the statute, would contradict its terms, for it says nothing about the interest being direct. The distinction is that what is given is not an interest in land, merely because the donee may by some legal proceedings acquire an interest in land. An ordinary debt is not an interest in land, though the creditor can by proceedings at law attach the debtor's land, and I think that the observations of the late Master of the Rolls were intended only to apply to such a case as that, the case of a gift of something which by itself gives no interest in land. The decision does not bear on the present case. The justices of the peace there had no power to seize the land or give any interest in it, but only to demand payment from certain persons. The fact that those persons could levy on the land the sums which they were called upon to pay, could not make those sums a charge upon or interest in land. In *In re Robson* (3) a debt was bequeathed, and at the time when it came to be enforced it had become payable out of land, but that did not alter its original character of a personal debt. None of these cases require an unnatural construction of the words of the statute. Here the question we have to answer is whether the

(1) 15 Ch. D. 363. (2) 15 Ch. D. 561.
(3) 19 Ch. D. 156.

testator's interest was an interest in land or not. It would be introducing too great a refinement to say that it was not. *Brook* v. *Badley* (1) is a strong case in favour of the Respondent, for there it could not be said that the charity could have laid hold of any land. Lord *Cairns* there said that the question was whether what was given was an interest in or charge on land.

The second point, whether the charity is not entitled to an apportionment, is a nice point, but it is covered by *Brook* v. *Badley*, and though sometimes a decision of the Court of Appeal is overruled, this is only to be done with great caution. I think, however, that the decision in that case was right. The whole mortgage debt is charged on realty as well as on pure personalty, and what the Appellant asks us to do is not to apportion but to marshal. Where a sum of money is given which is charged both on land and personalty, so that the whole is recoverable out of the land, I think there ought not to be an apportionment in order to take the bequest out of the statute.

BAGGALLAY, L.J.:—

I am of the same opinion, and will not go again through the cases considered by Lord Justice *Cotton*. The present case is covered by *Brook* v. *Badley*, which decides both points. I express my full concurrence in what has been said by Lord Justice *Cotton*, as to the plain words of sect. 3 of the Act not being controlled by the preamble.

FRY, L.J.:—

I am of the same opinion. The first question appears to me to be settled by simple reference to the words of the 3rd section of the Act. I do not see anything in the preamble which requires us to restrict their meaning, and the question, then, is whether these mortgage debts are or are not charges on real estate. They were charged on the interests of *cestuis que trust* under a settlement, the funds held upon the trusts of which were partly invested on mortgage of real estate, and in my opinion were therefore charged on real estate. It was contended that, in order to make the statute apply, the charge must be direct, but I decline to interpolate that into the Act. It is said that the late Master of the

(1) Law Rep. 3 Ch. 672.

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Rolls laid down that principle in *In re Harris* (1). I do not think that he did, but if he had done so, I should not have been able to follow him.

The second question is whether the gift of the £800 must wholly fail, or whether there ought to be an apportionment. I think that every pound of this sum is charged on the whole of the mortgaged property, and therefore is charged on land. It is said to be very anomalous that a bequest of the interests of the *cestuis que trust* under the settlement should be good *pro tanto* under the statute, and a bequest of a sum secured by mortgage of those interests should be wholly bad, but that results from the mortgage, which makes the whole sum secured a charge upon the land as well as on the personalty.

Solicitors: *Peacock & Goddard.*

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WEST LONDON COMMERCIAL BANK *v.* RELIANCE PERMANENT BUILDING SOCIETY.

[1883 W. 3174.]

Mortgagor and Mortgagee—Sale by Mortgagor and First Mortgagee—Notice of Second Mortgage—Proceeds of Sale, how to be applied.

A mortgagor of a leasehold house, with the concurrence of the first mortgagees, who had notice of a second equitable mortgage, sold the property. Upon completion, the balance of the purchase-money, after payment of the first mortgagees, was handed to the mortgagor.

In an action by the second mortgagees against the mortgagor (who did not appear) and the first mortgagees:—

Held (affirming *Bacon*, V.C.), that the first mortgagees were liable to make good to the Plaintiffs the amount of their security to the extent of the balance of the purchase-money.

The doctrine in *Peacock* v. *Burt* (2) will not be extended.

Dictum of *Wood*, V.C., in *Bates* v. *Johnson* (3), as to the right of a first mortgagee to transfer to a third mortgagee in preference to the second, questioned.

THIS was an appeal by the Defendant society from the judgment of Vice-Chancellor *Bacon* (4).

(1) 15 Ch. D. 561.
(2) 4 L. J. (N.S.) (Ch.) 33.
(3) Joh. 304, 313, 314.
(4) 27 Ch. D. 187.

The following particulars may be added to the facts stated in the former report. The charge of the 19th of March, 1879, by *Pike* in favour of the Plaintiffs, the bank, was not entered in the *Middlesex* registry. The notice of the charge was enclosed in a letter from the secretary of the bank to the secretary of the society, but it was doubtful whether the notice was communicated to the society's solicitors. At the time of the sale the existence of the notice appeared to have been forgotten by every one concerned, and it was apparently first brought to the attention of the society's solicitors in a letter written to them by the secretary of the bank on the 2nd of July, 1883, that is, after the completion of the sale.

Horton Smith, Q.C., and *Osler*, for the Appellants, the *Reliance Society*:—

The question is whether notice to a first mortgagee of a second mortgage converts him into a trustee for the second mortgagee so as to oblige the first mortgagee, on being paid off, to convey his legal estate to the second mortgagee.

The action is to make us liable to the Plaintiffs, the second mortgagees, on the ground that when *Pike*, the mortgagor, conveyed the property with our concurrence as first mortgagees, we had notice of the Plaintiffs' mortgage. We admit that the Plaintiffs gave us notice of their mortgage by the letter of the 19th of March, 1879, but it is not clear whether the notice was ever sent on to our solicitors: at all events, that old notice of 1879 was forgotten when the sale took place in 1883, and it ought not to be treated as notice that the Plaintiffs' mortgage was then in existence. The Plaintiffs' right to relief is in fact barred by their own laches in omitting to register their security, as they should have done under the *Middlesex Registry Act*, 7 Anne, c. 20, and thus preventing us from discovering it.

The facts of the case establish this—that the mortgagor, *Pike*, was the actual *bonâ fide* vendor: that the purchase-money was paid to his solicitors, Messrs. *Shaen & Roscoe*, who conducted the sale; and that out of that purchase-money the £119 15*s.* 3*d.* due to us was paid.

Now, although Messrs. *Shaen & Roscoe* were our solicitors as

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well as the mortgagor's, they had no authority as our agents to receive the whole of the purchase-money, their authority extending only to the amount of our debt: consequently we ought not to be held responsible for the balance. They should be treated as if they had received the purchase-money in two separate sums in separate pieces of paper, and had then handed one sum to the mortgagor and the other to the mortgagees. The authority under which the purchaser paid his purchase-money to Messrs. *Shaen & Roscoe* was the production by them of the conveyance, for sect. 56 of the *Conveyancing and Law of Property Act*, 1881, provides that the production by a solicitor of a conveyance containing in the body of it a receipt for the purchase-money is equivalent to an authority to the purchaser to pay the whole of the money to the solicitor: *In re Bellamy and Metropolitan Board of Works* (1); the section substituting the production of the deed for the written authority required by *Viney* v. *Chaplin*.(2).

[COTTON, L.J.:—The section is intended for the benefit of the purchaser and no one else.]

In the next place we submit it is clear that our mortgage not having been satisfied we were entitled to transfer our security to any person who would pay us off, in this case the purchaser.

[COTTON, L.J.:—You conveyed your estate but you did not transfer your mortgage: you conveyed "freed and discharged" from your mortgage debt.]

This is, in effect, so far as the mortgagees alone are concerned, a transfer to a person who pays them off, for the mortgagees do not receive from the purchaser the whole purchase-money, but only the amount of the debt: this shews that, as regards the mortgagees, it is a transfer from them to the purchaser of the security they hold. The fact that we had received notice of the second mortgage did not interfere with our right to transfer to the purchaser, for it is established that an unsatisfied first mortgagee, even with notice of a subsequent incumbrance, may transfer his legal estate to any one who pays him off, and who has no notice of a prior incumbrance: *Bates* v. *Johnson* (3); *Carter* v.

(1) 24 Ch. D. 387. (2) 2 De G. & J. 468.
(3) Joh. 304.

Carter (1), not touched on this point by *Pilcher* v. *Rawlins* (2); *Ex parte Knott* (3); *Peacock* v. *Burt* (4); *Jarman's* Conveyancing (5); *Coote* on Mortgages (6); *White & Tudor's* L. C. Eq. (7); *Sugden's* Vendors and Purchasers (8). It is not suggested that *Morel*, the purchaser, had any notice of the Plaintiffs' charge: and if the purchaser is safe the mortgagees whom he paid off and who therefore became trustees for him are safe also: *Ex parte Knott* (9). Notice by the Plaintiffs to the society gave them no priority: *Jones* v. *Jones* (10). It has never been decided that notice to a first mortgagee of a second mortgage makes him a trustee for the second mortgagee or imposes on him any duty as such; it only prevents him from tacking further advances against the second mortgagee: *Hopkinson* v. *Rolt* (11).

The sale being by the mortgagor, we concurred in the conveyance at his request so as to pass our estate, as we were bound to do under sect. 15 of the *Conveyancing and Law of Property Act*, 1881, notwithstanding any intermediate incumbrance: *Conveyancing Act*, 1882, s. 12. In any case we submit that we cannot be held liable to account for more of the purchase-money than we have actually received.

Hemming, Q.C., and *Neuman*, for the Plaintiffs:—

The law laid down in the authorities cited does not touch this case. The Plaintiffs' right is clear if the case is looked at thus: A man executes a mortgage of his estate; he then sells his equity of redemption out and out: then, notwithstanding that, he sells the estate to another person as if it were still his own, the mortgagee lends him the deeds to enable him to effect this second sale, and then hands them over to the second purchaser on the conveyance being executed and the mortgage paid off. The transaction is thus simply a reconveyance by the mortgagee by the mortgagor's direction to the mortgagor's nominee. Now, all that a mortgagee can do with his security on being paid off

(1) 3 K. & J. 617, 640.
(2) Law Rep. 7 Ch. 259.
(3) 11 Ves. 609.
(4) 4 L. J. (N.S.) (Ch.) 33.
(5) 3rd Ed. vol. v. p. 447.
(6) 3rd Ed. App. p. 569.
(7) 5th Ed. vol. i. p. 665.
(8) 14th Ed. p. 738.
(9) 11 Ves. 614.
(10) 8 Sim. 632.
(11) 9 H. L. C. 514.

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(unless he sells under his power of sale) is to transfer it to the person who pays him off: that is to say, he conveys the mortgaged estate subject to the equity of redemption; and there is no pretence for saying that, after the mortgagor has sold, or, what is the same thing *pro tanto*, mortgaged, the equity of redemption, he, the mortgagee, is entitled to reconvey the estate to or by the direction of the mortgagor. He must take the direction of the person entitled to the equity of redemption, *i.e.*, the person to whom it has been sold or mortgaged. In *Teevan* v. *Smith* (1) it has been decided that a first mortgagee is not entitled to assign the debt and property to a nominee of the mortgagor without the consent of the puisne mortgagee. There Mr. Justice *Fry* points out that the effect of a second mortgage is to pass the right to reconveyance from the mortgagor to the second mortgagee, because he is the assignee of the equity of redemption and so represents the mortgagor. On appeal, Sir *G. Jessel*, M.R., said: "Where there are first and second mortgagees, and the first mortgagee has notice of the second, when he is paid off he becomes a trustee of the legal estate for him." The rule has always been that if a mortgagor, after having mortgaged his estate, disposes of his interest in the estate, the person who takes that interest is the person entitled to redeem, and not the mortgagor. Now in the present case the society, the first mortgagees, have, with full knowledge of our right as assigns of the mortgagor, and as such entitled to a reconveyance, conveyed to the nominee of the mortgagor. They have thus acted directly contrary to the law as laid down in *Teevan* v. *Smith*. This is the first time it has been asserted that a first mortgagee with notice of a second mortgage is entitled to reconvey to or by the direction of the mortgagor. A first mortgagee with notice of a second mortgage becomes, the moment he is paid off, trustee for the second mortgagee, the payment off and the duty to reconvey being the foundation of the trust. With regard to the payment of the purchase-money by *Morel*, the purchaser, the agency of the solicitors who received it cannot be divided, as has been contended, between *Pike* and the society. As a matter of fact, it was received by the solicitors in one sum on the joint authority of *Pike* and the society.

(1) 20 Ch. D. 724, 729.

[COTTON, L.J.:—The contention is that, so far as the society is concerned, the authority of Messrs. *Shaen & Roscoe* was only as agents to receive £119 15*s.* 3*d.*, and that the society are therefore not liable for anything received by them beyond that sum. What do you say to that?]

The society said, in effect, to Messrs. *Shaen & Roscoe*, "you shall take the deeds and hand them over to the person nominated by the mortgagor on the completion of the sale." That was an authority to complete the transaction by a conveyance of the entire estate for the entire purchase-money: it was one entire sale. The conveyance itself states in terms that it is "with the concurrence" of the mortgagor: that is to say, it was a joint sale.

It is clear that, after a mortgagor has sold his interest, the first mortgagee cannot, on being paid off, convey to the mortgagor and ignore a second mortgage of which he has had notice, for that would be fraud.

[COTTON, L.J.:—My difficulty is upon *Peacock* v. *Burt* (1) and the other old cases, in which it has been held that the first mortgagee who has received his money from the third, can convey to the third notwithstanding notice of the second.]

All that is meant by those cases is that you cannot, by giving notice to the first mortgagee, cripple him in his right to get paid the best way he can: but the moment he is paid he is no longer a person to be protected, and the only question then is, for whom does he hold the legal estate? Those cases only apply to the transfer by the first mortgagee to a subsequent incumbrancer who pays him off, and do not apply and ought not to be extended to the case of a reconveyance to the mortgagor or to a purchaser from him.

There is very little authority as to the effect of a sale by a mortgagor and first mortgagee upon the rights of a second mortgagee, but the text-books adopt the view that the second mortgagee is not to be prejudiced: *Fisher* on Mortgages (2) and *Coote* on Mortgages (3), both referring to *Bentham* v. *Haincourt* (4).

(1) 4 L. J. (N.S.) (Ch.) 33.
(2) 4th Ed. pp. 580, 581.
(3) 5th Ed. pp. 1190, 1191.
(4) 1 Eq. C. Ab. 320.

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Upon the whole, we submit that this must be treated as a joint sale by *Pike* and the society, and that, as the purchase-money was received by Messrs. *Shaen & Roscoe* as their joint solicitors, and by their joint authority, they are equally liable to account to the Plaintiffs for the whole of the money so received.

Horton Smith, in reply:—

The law is clearly stated in *Bates* v. *Johnson*, where Vice-Chancellor *Wood* says (1): "If a second and a third mortgagee are both equally desirous of redeeming the first, the first mortgagee has it in his power, if he be so minded, to give the preference to which of the two he pleases."

[COTTON, L.J.:—I should doubt that very much: the second mortgagee is prior to the third.]

There is no difference between an unsatisfied mortgagee transferring to any one who pays him off, and a satisfied mortgagee reconveying. There is no authority that notice to a first mortgagee makes him a trustee for the party who gives him notice.

COTTON, L.J.:—

This appeal raises a nice point upon which it is said no authority is to be found. The facts are as follows:—[His Lordship stated them, and continued:—] The Vice-Chancellor has held that under these circumstances, *Pike* being out of the way, the Defendants, the *Reliance Society*, are answerable to the Plaintiffs for the purchase-money which ought to have been applied in payment of their charge.

Now, at first it appeared as if the whole of the money received by Messrs. *Shaen & Roscoe* had been received by them on behalf of the *Reliance Society*, they being their solicitors: but it was strongly urged by Mr. *Osler* that, not having express authority from the *Reliance* to receive the whole of the money, the solicitors must be taken to have received one part of it as agents of the *Reliance*, and the other part as agents of the mortgagor. I am inclined to think that Mr. *Osler's* point was a good one, though it does not appear to me to be necessary to determine it. But even

(1) Joh. 314.

if Messrs. *Shaen & Roscoe* are to be treated as having received the money in that way the question remains: Is the *Reliance* liable? Now the society affixed their seal to a deed which recited that *Pike* had, with the concurrence of the society, agreed with the purchaser to give him a title to the property free from incumbrances; and then, in consideration of £119 15*s.* 3*d.* by the direction of *Pike* paid to the society, and of the further sum of £380 4*s.* 9*d.* paid to *Pike*, making together £500, the society and *Pike* conveyed the property to the purchaser, *Morel*. It is said that *Morel* got the legal estate without notice, and in point of fact the Plaintiffs make no claim against him, and he is undoubtedly safe. It is established by the cases that where there are first, second and third mortgagees, the first mortgagee, even though he has notice of the second mortgage, can transfer the legal estate to the third mortgagee, if he had no notice when he took his security of the second mortgage, so as to give the third mortgagee priority over the second: that is to say, the first mortgagee can transfer his security to the third mortgagee, though the result may be to oust a person who would otherwise have had priority over the third mortgagee. Whether this is right, or whether we should so decide if such a case came before us, or whether the third mortgagee should, under such circumstances, be held liable to the second mortgagee, I give no opinion, for in the present case we have no transfer of the *Reliance's* mortgage subject to redemption by the person entitled to redeem—which would be, in fact, an ordinary transfer of mortgage—but a conveyance of the land by the first mortgagees free from the mortgage debt, so as to give the purchaser an absolute interest in the land. That is what the society did. They turned the land into money, and they executed this deed with the intention that their debt alone should be paid, and they disregarded the second mortgage and allowed the mortgagor to put the remainder of the money into his own pocket. In my opinion, that places the case in a different position from that of a transfer of a mortgage by the first mortgagee, for that he has authority to do when he is paid his money; but when the first mortgagee, as owner of the property and having the control over it, turns the land into money—for the owner of the equity of redemption cannot, without the

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concurrence of the first mortgagee, himself turn the land into money—if he, the first mortgagee, does so with knowledge that the money is not going to be applied in a proper manner, he is, in my opinion, as liable for the money as if he had received it under an express obligation to give it to the person properly entitled to it. It is conceded that if he exercises his power of sale as mortgagee, whether under the terms of the mortgage deed or by statute, he is answerable for the money he receives if he pays it to the wrong person, that is to say, if he passes over the second mortgagee and pays it to the mortgagor who has no right to receive it. Ought we, then, to make any distinction between such a case and the present? Here the first mortgagees, though they did not concur with the mortgagor in putting up the property for sale, did concur with him in the conveyance. Having done so with the knowledge that part of the purchase-money was going to be applied in violation of a right of which they had had notice, they are, in my opinion, just as liable as if they had received the whole of the money. Not being able to give a good receipt for the whole of the money, they must be held liable for that portion of it for which they could not give a good receipt, for it was in their power to refuse to concur in the sale unless the whole of the purchase-money was properly applied. I am, therefore, of opinion that the decision appealed from is right, though not quite on the same ground as was taken by the Vice-Chancellor, and that the Plaintiffs have established their right to make the Defendants, the *Reliance Society*, as well as *Pike*, answerable for the money received. I should add that I do not wish to suggest that the officers of the society were actually aware of the existence of the Plaintiffs' charge at the time of the sale: it seems to have been forgotten.

LINDLEY, L.J.:—

I am also of opinion that the judgment of the Court below is right. There are various ways of looking at this matter, and I should like to look at it as if the *Reliance Society* had present to their minds at the time of the sale the fact that the bank were second mortgagees. Would it not then be a clear case, both in law and in morality, against the society? They, with full

knowledge of the facts, would then have paid the money or allowed it to be paid to the mortgagor. It is perfectly true that I have assumed a fact which did not exist, for the society had not present to their minds the existence of the second mortgage, since, although they had received the notice, they had mislaid or forgotten it. They acted perfectly honestly; but if we are to treat them, as we must treat them for legal purposes, as having notice, it follows that they are still liable. What is the answer made to that? It is this, that Messrs. *Shaen & Roscoe,* who received the money, were acting for the mortgagor and the first mortgagees under separate authorities. I was struck with that argument, but it does not appear to me to cover the ground stated by Lord Justice *Cotton,* because, even if Messrs. *Shaen & Roscoe* had no authority to receive for the first mortgagees more than the amount of their debt, still they, as agents for the first mortgagees, facilitated the payment of the balance of the money to the mortgagor and allowed it to go in the wrong direction: consequently, as regards this balance, the first mortgagees are liable for the act of their agents.

Then another argument was addressed to us based upon *Peacock* v. *Burt* (1) and that class of cases, which have established the law as stated by Lord Justice *Cotton*; but, in my opinion, they are cases which certainly ought not to be extended. *Peacock* v. *Burt* looks very like a conspiracy between the first and third mortgagees to cheat the second, which cannot be right. That, however, is the aspect which many of the old cases on the subject bear; still, I am not at liberty to question those decisions, for, although they are opposed to my ideas of morality, they are nevertheless law. However, I am not going to make them the pretext for doing further wrong.

In my opinion the appeal fails.

BOWEN, L.J.:—

I concur.

Solicitors: *G. J. Shaw*; *Shaen, Roscoe & Co.*

(1) 4 L. J. (N. S.) (Ch.) 33.

G. I. F. C.

CHITTY, J.

1884

Dec. 3, 4, 8, 16.

1885

Jan. 15; *Feb.* 2, 3.

In re JOHNSON.
SLY *v.* BLAKE.

[1883 J. 554.]

Administration—Statutory Bar—23 & 24 *Vict. c.* 38, *s.* 13 [*Revised Ed. Statutes, vol. xiii., p.* 608]—"*Dying intestate*"—"*Present right to receive*"—*Part Payment.*

The operation of 23 & 24 Vict. c. 38, s. 13, is retrospective, so that the limitation of twenty years "next after a present right to receive the same shall have accrued" thereby imposed (in analogy to 3 & 4 Will. 4, c. 27, s. 40) upon claims to recover personal estate of "any person dying intestate, possessed by the legal personal representative of such intestate," is not confined to the case of persons dying intestate after the 31st of December, 1860, the time fixed by the section for commencement of the operation of the enactment.

Accordingly a claim by next of kin for general administration of the estate of an intestate who died in 1848 was barred at the end of twenty-one years from that date; and leave to revive an administration suit relating to the same estate in which no proceeding had been taken since the decree in 1855 was refused.

But with respect to assets of the intestate not received by the administrator until 1870 (more than twenty years after the death, and within twenty years before the issue of the writ) the claim of the next of kin to administration, limited to such assets, was not barred; there being no "present right to receive" on the part of the next of kin until the assets had been actually recovered by the administrator.

Part payment by the administrator out of a particular asset which has so fallen in will not revive the right to sue for general administration which was at the time of payment barred by statute.

TIMOTHY COLEMAN JOHNSON died intestate on the 2nd of October, 1848, leaving his son, *Timothy Coleman Johnson* the younger, and his daughters, *Ann Johnson* and the Plaintiff *Mary Sly*, his sole next of kin according to the *Statute of Distributions*, and on the 30th of October, 1848, letters of administration of the personal estate and effects of the intestate were granted to *T. C. Johnson* the younger. From that time until his death in March, 1882, *T. C. Johnson* the younger, it was alleged, had received the whole of the intestate's personal estate, and applied it to his own use without accounting for the same.

At the time of his death the intestate was entitled to considerable personal estate, including leasehold house property at *Spitalfields*.

He was also entitled in reversion expectant upon the death of *Martha Brooks*, and subject, as to part of the property, to the life interest of *Martha Rogers*, to the shares and interests of the persons beneficially entitled in reversion under the will of one *John Brooks* to the proceeds of sale of certain freehold, copyhold, and leasehold messuages and hereditaments devised and bequeathed by such will in trust for sale after the deaths of *Martha Brooks* and *Martha Rogers*.

Martha Brooks died in July, 1853, and in 1854 *T. C. Johnson* filed a bill (*Johnson* v. *Stubbs*) to establish his right as sole legal personal representative of the intestate to the proceeds of sale of the *Brooks* estate, and to the rents thereof until sale.

In March, 1855, a decree was made in that suit by Vice-Chancellor *Stuart* for a conveyance of the *Brooks* estate to *T. C. Johnson* the younger, subject to certain payments.

It appeared that *T. C. Johnson* the younger did not make these payments until some time in 1867.

By deed of the 27th of February, 1868, the property forming the subject-matter of the suit of *Johnson* v. *Stubbs* was conveyed to *T. C. Johnson* by *Brooks'* representatives. The date of the death of *Martha Rogers*, who emigrated to *Australia*, was not distinctly ascertained, but between 1868 and 1877 portions of the *Brooks* estate were sold, and the proceeds (and before sale the rents) had been received by *T. C. Johnson* as part of the personal estate of the intestate. In particular £5029 was received by him in 1870 in respect of a sale of part of the *Brooks* estate to the *London and North Western Railway Company*, and £3500 in 1877 in respect of a sale to *Samuel Morley* of another part. A sum of £206 16*s.* 3*d.* was also paid to *T. C. Johnson* in May, 1867, in respect of a charge held by the intestate upon a policy on the life of one *Henry Ashley*.

In 1855 *Ann Johnson*, being unable to obtain from her brother, *T. C. Johnson*, any part of her share of the intestate's personal estate, filed a bill against him, and by decree at the Rolls of the 27th of March, 1855, the usual accounts and inquiries were

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directed as to the personal estate of the intestate come to the hands of *T. C. Johnson* as his administrator.

Notwithstanding this decree *Ann Johnson* was unable to obtain any account from *T. C. Johnson*, who did not comply with the order of the Court; but the statement of claim in the present action alleged, and evidence was given on this point, that in or about 1857 *T. C. Johnson* agreed with *Ann Johnson* that if neither she nor her sister, the Plaintiff Mrs. *Sly*, took any further proceedings against him in the suit, and allowed him during his life to retain possession of their shares of the intestate's estate, he would not make any will, but would allow the whole of the property retained by him, including his own share, to devolve on *Ann Johnson* and *Mary Sly* as his "heirs."

It appeared that in June, 1870, after receiving the £5029 purchase-money from the *London and North Western Railway Company*, *T. C. Johnson*, out of such money, paid £1000 to *Ann Johnson* in respect of her share in the intestate's estate, but nothing was ever paid to the Plaintiff on account of her father's estate. *T. C. Johnson* died in March, 1882, having by his will bequeathed all his personal estate to the Defendant *Elizabeth Blake* (whom he appointed executrix) absolutely, and devised his real estate to her for life with remainder to the Defendant *Robert Halcrow*.

Ann Johnson died in January, 1883, intestate. The Plaintiff *Mary Sly* as sole heiress and next of kin and legal personal representative of *Ann Johnson*, and also, as executrix *de bonis bon* and sole legal personal representative of the intestate *T. C. Johnson* the elder, commenced this action on the 11th of April, 1883, against *Elizabeth Blake* and *Robert Halcrow*, claiming administration of the personal estate of *T. C. Johnson* the elder, and an account of the personal estate of the intestate come to the hands of *Timothy Coleman Johnson* the younger as administrator of the intestate, with interest at 4 per cent. from the respective times of his receiving the same, and that what on taking such account should be found due from *T. C. Johnson* the younger be answered by the Defendant *Elizabeth Blake*, the executrix of *T. C. Johnson* the younger; and that this action be taken to be supplemental to the action of *Johnson* v. *Johnson*

brought in 1855, by *Ann Johnson*, deceased, for the administration of the intestate's estate, and in which a decree was made in March, 1855.

The Defendants relied, as a defence to the action, on the long delay and laches of Plaintiff in prosecuting the action of *Johnson* v. *Johnson* for the administration of the estate of the intestate, the decree in which was made on the 27th of March, 1855, and the latest proceedings in which was taken in June, 1856. They also relied on 23 & 24 Vict. c. 38, and all other Acts and statutory provisions for the limitation of actions.

Ince, Q.C., *Hull*, and *Asquith*, for the Plaintiff:—

The Defendants will rely upon the *Statutes of Limitation*, and the question turns upon 23 & 24 Vict. c. 38, s. 13, which extends s. 40 of 3 & 4 Will. 4, c. 27, to cases of claims to recover personal estate of an intestate possessed by the legal personal representative of such intestate.

These sections are both future in their language, and do not apply to the case of an intestate who died before the 31st of December, 1860. Similar words "shall be" and "shall be deemed to have first accrued" occurring in sect. 7 of 3 & 4 Will. 4, c. 27, have been held not to apply to cases where the event on which the right of action accrued took place before the passing of the Act: *Doe* v. *Page* (1); *Doe* v. *Bold* (2).

[*Macnaghten*, Q.C., called attention to *Willis* v. *Earl Howe* (3) as deciding that the words "after the 31st of December, 1860" and "any person dying intestate" did not limit the operation of 23 & 24 Vict. c. 38, s. 13, to the case of persons dying intestate after that date.]

Assuming that sect. 13 is retrospective, we are entitled to revive the original suit of *Johnson* v. *Johnson* and thus take the case out of the statute. After a decree for an account there is no absolute bar by any Statute of Limitation or by any rule of the Court to the right to revive, though such right is subject to the discretion of the Court; and where, as in this case, the delay has been occasioned entirely by the conduct of the administrator,

(1) 5 Q. B. 767. (2) 11 Q. B. 127.
(3) 29 W. R. 70.

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and there has been no variation of the rights of the parties caused by the delay, the Court will not exercise the discretion adversely: *Higgins* v. *Shaw* (1); *Curtis* v. *Sheffield* (2); *Fussell* v. *Dowding* (3).

So long as any part of the assets is still reversionary it cannot be said that "a present right to receive the same" has accrued within 23 & 24 Vict. c. 38, s. 13, so as to bar the right to claim a general administration after the expiration of twenty years: *Adams* v. *Barry* (4); *Prior* v. *Horniblow* (5). In this case the right of payment in respect of the *Brooks* estate assets first accrued in 1868, when the conveyance was made to *T. C. Johnson*, the administrator; and as this action has been brought within twenty years from that date it is not barred by 23 & 24 Vict. c. 38, s. 13.

Then sect. 13 of 23 & 24 Vict. c. 38, only applies to assets distributed by the administrator, and not to assets retained by him: *Reed* v. *Fenn* (6).

We submit that on the evidence there was a valid declaration of trust by *T. C. Johnson* in favour of his sisters, and as the Plaintiff was under coverture until 1865, when her husband died, the *Statute of Limitations* cannot until then have begun to run against her claim.

Romer, Q.C., *Woodroffe*, and *Neville*, for the Defendant *Elizabeth Blake*:—

As to the right to a general administration, time runs from the end of a year from the intestate's death, or at latest from the date of the decree in *Johnson* v. *Stubbs*, which established the right of the administrator to the *Brooks* assets, when a "present right to receive" the personal estate first accrued. *Adams* v. *Barry* (7) and *Prior* v. *Horniblow* are authorities in favour of our contention that the right of the Plaintiff to a general administration is barred; it having been expressly held that residuary property, for ascertaining the amount of which no suit is necessary, is within the corresponding provision of 3 & 4 Will. 4, c. 27,

(1) 2 D. & War. 356.
(2) 20 Ch. D. 398.
(3) 27 Ch. D. 237.
(4) 2 Coll. 285, 290, 294.
(5) 2 Y. & C. Ex. 200.
(6) 35 L. J. (Ch.) 464.
(7) 2 Coll. 290.

s. 40. The right of the next of kin to his share of the residue is like that of a residuary legatee under a will, a clear, definite, and tangible interest coming to him by operation of law: *Cooper* v. *Cooper* (1); and unless the legatee can establish that there was no other fund than assets which did not accrue until twenty years after the testator's death, applicable for payment of his legacy, his claim will be barred by statute: *Bright* v. *Larcher* (2).

[CHITTY, J., referred to *In re Blachford* (3).]

Macnaghten, Q.C., and *Jason Smith*, for the Defendant *Halcrow*, the devisee under the will of *T. C. Johnson* the younger:—

The pleadings shew that there was a clear residue immediately after the intestate's death, and therefore the Plaintiff's claim is barred by statute. The words "a present right to receive the same" used in 3 & 4 Will. 4, c. 27, s. 40 (and in 23 & 24 Vict. c. 38, s. 13), must be understood to mean an immediate right without waiting for the happening of any future event; *Farran* v. *Beresford* (4). *Prior* v. *Horniblow* (5) is distinctly in our favour and opposed to the Plaintiff's contention. *Adams* v. *Barry* (6) is distinguishable, as that was an action by the representative of one of the executors against the representative of the co-executor.

Ince, in reply.

Jan. 15. CHITTY, J.:—

The principal questions turn upon the construction of sect. 13 of 23 & 24 Vict. c. 38. The first question (whether that section is retrospective) appears to me not to be reasonably open to argument. I entertain no doubt that the words "dying intestate" apply to an intestate who died before the passing of the Act. The Act was passed on the 23rd of July, 1859, and sect. 13 gave a short suspensory period, viz. until the end of that year, during which actions could be brought that would not fall within the limitation of time enacted. The section was passed, as appears

(1) Law Rep. 7 H. L. 53, 66.
(2) 27 Beav. 130; 4 De G. & J. 608.
(3) 27 Ch. D. 676.
(4) 10 Cl. & F. 319, 334.
(5) 2 Y. & C. Ex. 200.
(6) 2 Coll. 290.

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by the preamble, to extend the enactment of sect. 40 of 3 & 4 Wm. 4, c. 27, to the case of claims to the estates of persons dying intestate. The enactments are *in pari materiâ* and ought to be construed together. It is clear that the enactment of sect. 40 applied to the case of a testator who had died before the passing of that Act. The point on the statute 23 & 24 Vict. c. 38 appears to have been decided by Vice-Chancellor *Malins* in *Willis* v. *Earl Howe* (1), and it was decided by Lord Justice *James*, when Vice-Chancellor, in 1869 in the unreported case of *Baylis* v. *Howard*, in which I was counsel for one of the defendants. That was, I believe, the last of a series of attempts made by persons claiming to be next of kin of an intestate who had died about the beginning of the century to recover from Lord *Beauchamp* certain large real estates which had been purchased out of the intestate's personal estate.

The second question turns on the meaning of the words "present right to receive the same." The intestate *Johnson* died in 1848, and the Defendants contend that the Plaintiff's right was barred at the end of twenty years from his death, or at all events of twenty-one years, the additional year being conceded in conformity with the general rule that an executor or administrator is allowed in an administration case one year to complete the administration of the estate. In the absence of any special circumstances relating to the getting in of an intestate's estate, I think that the latter contention is correct, and that the Plaintiff's claim for the general administration of the intestate's estate is barred. The decree of 1855 obtained by *Ann Johnson* against the administrator was not prosecuted after 1856. Regard being had to the long lapse of time, more than a quarter of a century, and to the death of *T. C. Johnson* the younger in the interval, it would not be a right exercise of the discretion which is vested in the Court to allow that suit to be revived.

But I am of opinion that the claims of the Plaintiff in her own right and as administratrix of her deceased sister are not barred in reference to such of the assets as came into the possession of *T. C. Johnson* the administrator, within twenty years before the 11th of April, 1883, the day on which the writ was issued. These

(1) 29 W. R. 70.

assets include the policy, which did not become a claim and was not received until 1867, and the houses and property forming part of *Brooks'* estate, in which the intestate had a reversionary interest. *T. C. Johnson* the younger, did not obtain a conveyance of this property from *Brooks'* representatives until 1868. This appears to me to be the date at which the statutory period began to run as to the *Brooks* asset. True it is that he established his right to the property in 1855 by the decree of that date against *Brooks'* representatives; but although he had apparently sufficient assets in his hands of the intestate to enable him to perform the condition in that decree for some considerable time before 1868, it was not until that year that he performed the condition by making the payment required and became entitled to a conveyance. The term "present right to receive" occurs in sect. 40 of 3 & 4 Wm. 4, c. 27, as well as in the statute now under consideration, and, as I have said, the two enactments ought to be construed together. The enactments apply as between the legatees or next of kin on the one hand, and the executor or administrator on the other hand: and they are for the benefit of the executor or administrator, or their representatives, the object being to afford them a statutory defence against stale demands, which by reason of the lapse of time may fairly be deemed to have been satisfied. The right to receive means the right to receive from the executor or administrator or their representatives, and not from the debtor to the estate, from whom the legatee or next of kin has no right to receive. The right to a legacy and the right to receive a legacy are, (as was pointed out by Lord *Romilly* in *Earle* v. *Bellingham* (1)), obviously distinct rights. And the observation applies equally to a share of the residue of an intestate's estate. But the enactments speak not merely of a right to receive, but, emphatically, of a present right to receive. The next of kin have no present right to receive from the administrator a reversionary asset belonging to the intestate, before it falls into possession and is possessed by him, nor where he is compelled to take proceedings to recover an outstanding asset, before he recovers it or obtains possession of it. It is argued for the Defendants that the administrator might sell the outstanding

(1) 24 Beav. 448.

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reversionary assets with a view to the distribution of the proceeds among the next of kin. If he had sold them before they fell into possession different considerations would have arisen. Whether it is a breach of duty on his part not to make such a sale would depend on the circumstances; in the case before me no loss arose from the administrator not selling the property before he obtained the conveyance: on the contrary the value of the asset appears to have increased to a large extent by allowing it to remain outstanding until it fell into possession, and until it was actually recovered and conveyed. But even assuming that the omission to sell was a breach of duty on the part of the administrator, it appears to me that he cannot take advantage of his own wrong, and that the statute was not intended to bar the demand in such a case. To hold that it was so intended would in my opinion be to contravene not merely the words of the statute, but the principle on which it was based, and to put a forced and unnatural meaning on the statute which would work grievous injustice. Take the case of an asset consisting of a bond not payable till after the expiration of twenty-one years from the intestate's death, or of a reversionary interest in a trust estate not falling into possession until after the like period, and assume that the administrator was ignorant of the asset, I see no reason why the administrator should when it is got in be allowed to retain it for his own benefit to the exclusion of the next of kin; and yet the argument for the Defendants, if pushed to its extreme length, would necessarily lead to that injustice. I have considered the question on principle, because the Defendants' counsel have urged that it is not covered by authority. I think that is an error. I consider that Lord Justice *Knight Bruce*, when Vice-Chancellor, did decide the question on sect. 40 in *Adams* v. *Barry* (1), and if so, the principle of the decision applies to the statute 23 & 24 Vict. That case was decided so long ago as 1845, and is treated by text-writers as a decision that sect. 40 will not bar the claim of residuary legatees to assets not possessed by the executor until within twenty years before suit: *Lewin* on Trusts (2), and *Shelford's* Real Property Statutes (3). It is true that the Vice-Chancellor did not

(1) 2 Coll. 290. (2) 7th Ed. p. 755.
(3) 8th Ed. p. 242.

make a declaration, but only granted an inquiry; but I think he would not have granted the inquiry if he had not intended to decide the question of law at the hearing. I think the question is also covered by the decision of Lord *Romilly* in *Reed* v. *Fenn* (1). The judgment in that case is reported in different terms in 35 L. J. (Ch.) 464, and 14 W. R. 704. Some of the expressions or *dicta* attributed to him in those reports are not properly capable of being supported on the true construction of the statute: such, for instance, as the remark that the statute does not apply to assets remaining undistributed, or that the administrator is a trustee for the next of kin, if it is meant that he is trustee so as to exclude the operation of the statute. Still, assuming that some such expressions did fall from him, I think the result of his decision supports the conclusion at which I have arrived.

The issues of fact which were raised become of minor importance in the face of my judgment on the point of law.

His Lordship after stating his findings: 1st, that there was no such agreement to die intestate as was alleged, but merely some promise or representation of a vague kind; 2nd, that part payment of £1000 was made by the administrator to *Ann Johnson* on the 27th of June, 1870, shortly after he received the purchase-money from the *London and North Western Railway Company*, and was in fact made out of the moneys so received in respect of the *Brooks* asset, more than twenty-one years after the intestate's death, directed the case to be put into the paper for argument upon the question whether this payment amounted to a part payment or acknowledgment so as to take the case out of the statute and revive the right to general administration.

Ince, Q.C., for the Plaintiff, contended that the payment of £1000 in 1870, within twenty years before the commencement of this action, was general, and was a sufficient acknowledgment of the right of the Plaintiff and her sister within 23 & 24 Vict. c. 38, s. 13, to bar the operation of the statute, and to keep alive the right to a general administration: *Toft* v. *Stephenson* (2); *Harty* v. *Davis* (3).

(1) 35 L. J. (Ch.) 464. (2) 1 D. M. & G. 28; 5 D. M. & G. 735.
(3) 13 Ir. Law Rep. 23.

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1885

In re JOHNSON.

SLY *v.* BLAKE.

Macnaghten, Q.C.:—

The claim of Plaintiff to a general administration after the expiration of twenty years from the intestate's death is barred by statute, and cannot be revived by any subsequent part payment or acknowledgment: *Adams* v. *Barry* (1).

Feb. 3. CHITTY, J.:—

The question is as to the effect of the payment of £1000 to *Ann Johnson* in 1870. At that time the right to sue for a share of the general estate of the intestate was barred. Upon the facts I have held the payment of £1000 was out of the particular asset received by the administrator from the *London and North Western Railway Company* in June, 1870, and was made in respect or on account of that asset. The Plaintiff's counsel contend that the effect of the payment was to restore in favour of *Ann Johnson* the right to sue for her share in the general estate. Part payment and acknowledgment stand together on the statute. The Plaintiff's counsel admit, and I think rightly admit, that a partial and restricted acknowledgment would not restore the general remedy: but they say that a distinction ought to be drawn between such an acknowledgment and a part payment, and there cannot be a limited or restricted part payment on the true construction of the statute. I think that no such distinction ought to be allowed. To hold the contrary would be to place great temptation in the way of administrators and lead to serious inconvenience. Supposing that after the remedy was barred by the statute as to the general estate, say twenty years after the bar and maybe fifty years after death; if in these circumstances the administrator receives an asset, such as the money payable under a policy of assurance on the life of a third person, what is he to do? If he is honest he divides it among the next of kin; but according to the argument for the Plaintiff he thereby renders himself liable to be sued at any time within the next twenty years for the general administration of the estate. Mr. *Ince* says that his right course, if he understands the statute, is to refuse to pay and to allow the next of kin to sue: and then in

(1) 2 Coll. 285, 290.

the action to plead the statute, and in the result to suffer judgment in respect of the particular asset. The result would be practically that a strong temptation would be put on the administrator to say nothing about the asset and to keep it in his own pocket. To open the whole remedy would be to my mind inconsistent with the general principles on which the statute is founded. If the particular asset fell in, say forty years after the intestate's death, a further period of twenty years would be given to the next of kin; and they could institute their action at a time when the administrator had long been dead and his papers perhaps lost or destroyed, and his representatives would probably be defenceless. The case I am putting is scarcely a hypothetical one.

I purposely refrain from expressing any opinion on the words "unless in the meantime" used in 23 & 24 Vict. c. 38, s. 13.

MINUTE OF ORDER:—"Declare that there was no agreement between *T. C. Johnson* the younger and *Ann Johnson*, deceased, and the Plaintiff, that the said *T. C. Johnson* the younger should die intestate; And declare that the Plaintiff *Mary Sly* in her own right as one of the next of kin of *T. C. Johnson* the elder, and as administratrix of the deceased Plaintiff *Ann Johnson*, one other of such next of kin, is entitled to two equal third parts of so much of the personal estate of the said *T. C. Johnson* the elder as came into the hands of *T. C. Johnson* the younger, the administrator of his estate and effects, subsequently to the 11th of April, 1863, being twenty years prior to the date of the writ in this action; And the Court finding as a fact that the sum of £1000 was paid by the said *T. C. Johnson* the younger to the said *Ann Johnson* shortly after the 27th of June, 1870, out of such part of the said intestate's estate as was conveyed and assigned to *T. C. Johnson* the younger, his administrator, by deed dated the 27th of February, 1868 (*Brooks* asset), Declare that the Plaintiff *Mary Sly* is not as administratrix of the late Plaintiff *Ann Johnson* entitled by reason of such part payment out of "*Brooks* asset" to general administration of the estate of *T. C. Johnson* the elder."

Accounts and inquiries upon the footing of the above declarations were then directed.

Solicitors: *George Brown, Son, & Vardy; John Godwin; Jennings & Son.*

F. G. A. W.

CHITTY, J.
1885
March 19, 24.

In re PATIENCE.
PATIENCE *v.* MAIN.

[1884 P. 398.]

Domicil—Unsettled Residence—Territorial Limits of England—Domicil of Origin.

P. was born in *Scotland*, in 1792, of Scotch parents. In 1810 he obtained a commission in the army, and immediately proceeded with his regiment on foreign service, and served abroad till 1860, when he retired from the army. From 1860 till his death he resided in lodgings, hotels, and boarding-houses in various places in *England*, dying in 1882, intestate and a bachelor, in a private hotel in *London*, leaving no real estate in *England*, and no property whatsoever in *Scotland*. From the year 1810 till his death he never revisited *Scotland*, and for the last twenty-two years of his life never left the territorial limits of *England*:—

Held, that the domicil of the intestate at his death was Scotch.

Adjourned summons.

Colonel *James Patience*, the intestate in this case, was born in 1792, of parents in a humble position of life, at *Avock*, in the county of *Ross*, in *Scotland*. In the year 1810 he obtained a commission in the army, and immediately proceeded with his regiment on foreign service and served in various parts of the world from that time until the year 1860, when he sold his commission and retired from the army. From 1860 till his death he lived in lodgings, hotels, and boarding-houses in *London*, *Margate*, *Ramsgate*, *Folkstone*, *Hastings*, *Harrogate*, and other places in *England*, and died intestate and a bachelor at a private hotel in *London*, in 1882, leaving personal estate consisting of bank annuities and moneys at his bankers amounting in the whole to about £7500, but no real estate of any kind in *England*, and no property of any kind in *Scotland*. From the time he obtained his commission in 1810 till his death he never revisited *Scotland*, and for the last twenty-two years of his life never left the territorial limits of *England*.

It appeared from the evidence that the intestate was a very reticent man, and never went into society, and after he left the army avoided his late brother officers, never mentioned his rela-

tives, nor ever in any way referred to the place of his birth, or to where he had lived before he entered the army, and in fact it was not known till after his death that he was by birth a Scotchman.

After his death an envelope was found containing two letters, and on the envelope a memorandum in the handwriting of the intestate in the following terms: "*London*, August 20, 1860. The enclosed two letters are from my late brother, the Rev. *John Patience*, minister of the parish of *Ardnamurchan, Argyllshire, North Britain*. He died in, I think, the year 1827. I had then living a sister named *Catherine*, married to a Mr. *Fletcher*, who occupied a farm near *Tobermory*, in the *Island of Mull*. She died, I have been informed, in 1854, and left a numerous family of sons and daughters. I have had no communication with any of my relatives for many, many years, and I must accuse myself of being the cause of this long silence. *J. Patience*, late Major 65th Regiment."

With the exception of the above-mentioned facts there were no other circumstances from which to infer an intention on the part of the intestate to abandon his domicil of origin and acquire an English domicil.

The question was whether the domicil of the intestate at his death was Scotch or English.

Macnaghten, Q.C., and *A. Anderson*, in support of the contention that the intestate had acquired an English domicil:—

Though the intestate had no fixed place of abode in this country, yet it is a fact that he resided here for the last twenty-two years of his life. A continued residence, even in lodgings, is stronger than any declaration of intention. He resided within the territorial limits, and it is not necessary to have any particular spot within those limits. There is no foundation in law for saying that a man cannot acquire a domicil in a country where he is only a lodger and not a housekeeper: *Whicker* v. *Hume* (1). The mere fact of his living in lodgings cannot make any difference. It may be a circumstance making it less probable that he meant to establish a residence; but it is only a circumstance: *Whicker* v. *Hume* (2). The absence of seventy years from *Scotland* is as

(1) 13 Beav. 366, 401. (2) 7 H. L. C. 124, 157.

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complete an abandonment of the domicil of origin as could possibly be. Length of residence, according to its time and circumstances, raises the presumption of intention to acquire a domicil. The residence may be such, so long and so continuous, as to raise a presumption, nearly, if not quite, amounting to a *præsumptio juris et de jure*, a presumption not to be rebutted by declarations of intention or otherwise than by actual removal: *Hodgson* v. *De Beauchesne* (1); *Doucet* v. *Geoghegan* (2). Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the intention of continuing to reside there for an unlimited time. Residence originally temporary or intended for a limited period may afterwards become general and unlimited, and in such case so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicil is established: *Udny* v. *Udny* (3); *Haldane* v. *Eckford* (4). In this case the continued residence for twenty-two years in *England* proves the *animus manendi*. The absence of all intention to cease residing in a place is sufficient to constitute the *animus manendi* (5), and if the purpose of remaining in the territory is proved, a particular time is not necessary: *Arnott* v. *Groom* (6). We submit that the intestate had lost his domicil of origin, and that at his death in 1882 his domicil was English.

Morshead, for parties in the same interest.

Romer, Q.C., and *Lock*, in support of the contention that the intestate had not lost his domicil of origin:—

The birth domicil of the intestate was in *Scotland*, and the *onus* lies upon those who desire to shew that there was a change in this domicil to prove that that change took place: *Bell* v. *Kennedy* (7); and that *onus* the other side have not discharged. A new domicil is not acquired until there is not only a fixed intention of establishing a permanent residence in some other

(1) 12 Moo. P. C. 285, 329.
(2) 9 Ch. D. 441, 456.
(3) Law Rep. 1 H. L., Sc. 441, 458.
(4) Law Rep. 8 Eq. 631, 640.
(5) Story's Conflict of Laws, s. 33.
(6) 9 Court Sess. Cas. 2nd Series, 142, 150.
(7) Law Rep. 1 H. L., Sc. 307, 310.

country, but until also this intention has been carried out by actual residence there (1), and we say that in this case it has not been shewn that the intestate had any fixed intention of taking up his residence here. Residence must be of such a character that you can infer an *animus manendi*. The intestate no doubt resided in *England* for the last twenty-two years of his life, but with what *animus* or intention his residence continued here we have no means of learning. For although residence may be some small *primâ facie* proof of domicil, it is by no means to be inferred from the fact of residence that domicil results, even although you may not find that the party had any other residence in existence or in contemplation: *Bell* v. *Kennedy* (2). Residence alone, however long, is immaterial unless coupled with the intention of changing the domicil: *Udny* v. *Udny* (3). To constitute a new domicil in a place there must not only be the *factum* of residence there, but the *animus manendi*, that is, there must be a fixed resolution to have a permanent and continued residence in the place of actual residence: *Brown* v. *Smith* (4). To effect the abandonment of the domicil of origin and substitute another in its place the choice of a place is required, and actual residence in the place when chosen, and it must be the principal and permanent residence, and the domicil of origin must prevail unless it be proved that the party has acquired another by residence coupled with an intention of making that his sole residence and abandoning his domicil of origin: *Munro* v. *Munro* (5).

There is nothing in this case to shew that the intestate, who admittedly wandered about from place to place without any fixed place of abode, had any intention at any time during the twenty-two years he was here of taking up his residence here, and we submit that under these circumstances he retained at his death his domicil of origin.

[They also referred to *Attorney-General* v. *Dunn* (6), and *Stanley* v. *Bernes* (7)].

(1) Law Rep. 1 H. L., Sc. 319.
(2) Ibid. 321.
(3) Ibid. 456.
(4) 15 Beav. 444, 449.
(5) 7 Cl. & F. 842, 877.
(6) 6 M. & W. 511.
(7) 3 Hagg. Ecc. 373.

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Macnaghten, in reply:—

Residence in a country is *primâ facie* evidence of the intention to reside there permanently, and is so far evidence of domicil: *Dicey's* Law of Domicil (1).

CHITTY, J.:—

The question is whether the domicil of the intestate at his death was Scotch or English. He was born in *Scotland*, and the burden of shewing that he acquired a new domicil by choice is upon those who assert it. It is contended that in the circumstances his domicil was English. The question arises with reference to succession to his personal estate: if the law of *Scotland* governs the succession a larger class of next of kin will be admitted than according to English law, the English law carrying a right of representation as far only as brother's and sister's children, and the Scotch law carrying it a degree or degrees further. When he was eighteen years of age he obtained a commission in the army, and from that time until his death he never re-visited *Scotland*. When he was sixty-eight years of age he sold his commission and retired from the army. In the interval between his obtaining his commission and his retirement from the army he was employed with his regiment chiefly on foreign service. He died a bachelor at a private hotel in *London* when he was ninety years of age, and he spent the last twenty-two years of his life in *England*. He appears to have been, at any rate when he grew old and deaf, a person of reserved disposition. He had few friends in *England* or elsewhere, and his mode of life is described in the affidavit of Mr. *Bennett*, who was a member of a firm of army agents with whom he kept a banking account as well before as after his retirement from the army. Mr. *Bennett* says: "From 1860"—that is the date of his retirement from the army—"to the time of his death in October, 1882, he lived in lodgings, hotels, and boarding-houses in *London*, *Margate*, *Ramsgate*, *Folkestone*, *Hastings*, and *Harrogate*, and other places in *England*, and finally died in a private hotel, 90, *Charlotte Street, Fitzroy Square*." He lived according to the

(1) R. 18, p. 122.

same affidavit in an economical fashion, spending about £2 a week on his living and maintenance, having a small fortune, chiefly the result of the sale of his commission in the army. There is no declaration either written or oral bearing on the question of his intention to change his domicil. At his death an envelope was found with an indorsement in his handwriting, which envelope does not throw much light on the subject. It is dated in August, 1860, and incloses two letters, to which he refers, from his brother, whom he describes as a minister of a parish in *North Britain*. He states his brother died, he thinks, in the year 1827, and he says: "I had then living a sister named *Catherine*, married to a Mr. *Fletcher*, who occupied a farm near *Tobermory*, in the *Island of Mull*. She died, I have been informed, in 1854, and left a numerous family of sons and daughters. I have had no communication with any of my relations for many, many years, and I must accuse myself of being the cause of this long silence."

That paper was written after he retired from the army. As I say, that throws very little light upon the matter. It shews he remembered his Scotch relations, and I do not see what other inference can be drawn from the paper. Now the nature of the question may be stated in the language of Lord *Cairns* in the case of *Bell* v. *Kennedy* (1), making only those alterations which the different circumstances justify. The question is whether the intestate had determined to make and had made *England* his home with the intention of establishing himself there and ending his days in that country. It may be conceded that the residence, such as it was, in this country, that is to say within the territorial limits of *England*, was sufficient to prove the fact of his residence here. The real question is whether the Court ought to infer from the twenty-two years which were spent in *England* in the manner described in the evidence an intention of making *England* his home and of adopting *England* as his new domicil. Lord *Cranworth* in *Whicker* v. *Hume* (2) referred to this kind of life. He says: "I am not prepared to say that it would make any difference if he had been in lodgings only, or, to use a common expression, only lying at single anchor, so that he could easily go away. That may be a circumstance making it less probable that he

(1) Law Rep. 1 H. L., Sc. 311. (2) 7 H. L. C. 124, 157.

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meant to establish a residence in that place. It is, however, only a circumstance. Why, how many people are there who have lived all their lives in chambers in Inns of Court? Nobody can doubt that they are domiciled there, although that may not be the sort of place in which persons marrying or settling are in the habit of being found."

In the Scotch case of *Arnott* v. *Groom* (1) the Scotch Judges differed in opinion with regard to the effect of such a residence as that which is shewn in the case before me. Lord *Fullerton* says (2): "I do think it would be difficult, on the principle of the decision in the case of *Munro*, to hold that a life so unsettled could argue anything but that sort of fluctuation of mind as to domicil which was insufficient to take off the subsistence of a domicil formerly established. Temporary visits to friends, and casual and shifting residences in lodgings and hotels seem to fall short of the evidence which would be required, to prove the actual constitution of a fixed domicil." Lord *Jeffrey* would not admit what Lord *Fullerton* assumed to be the rule, and says that he will not admit it, namely, "that in order to make a domicil, it is necessary to have some particular spot within the territory of a law—that it is not enough that the party shall have an apparently continual residence there, but shall actually have a particular spot, or remain fixed in some permanent establishment. In considering the *indiciæ* of domicil these things are important; but they are not necessary, as matter of general law, to constitute domicil. Many old bachelors never have a house they can call their own. They go from hotel to hotel, and from watering-place to watering-place, careless of the comfort of more permanent residence, and unwilling to submit to the *gêne* attendant on it. There was the case of a nobleman who always lived at inns, and would have no servants but waiters; but he did not lose his domicil on that account."

In *Doucet* v. *Geoghegan* (3) the late Master of the Rolls, sitting in the Court of Appeal, quoted with approval a passage from Dr. *Lushington's* judgment in the case of *Hodgson* v. *De Beau-*

(1) 9 Court Sess. Cas. 2nd Series, 142.

(2) 9 Court Sess. Cas. 2nd Series, 148, 150.

(3) 9 Ch. D. 441.

chesne (1). The passage is this (2): "We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicil. The residence may be such, so long and so continuous, as to raise a presumption nearly, if not quite, amounting to a *præsumptio juris et de jure*; a presumption not to be rebutted by declarations of intention or otherwise than by actual removal." I observe in that passage Dr. *Lushington* does not speak merely of the length and continuity of the residence, but he speaks of the character of the residence, saying that the residence may be such, so long and so continuous, as to raise the presumption to which he refers.

In *Bell* v. *Kennedy* (3) Lord *Westbury* states, "residence and domicil are two perfectly distinct things." Again, he says: "For although residence may be some small *primâ facie* proof of domicil, it is by no means to be inferred from the fact of residence that domicil results, even although you do not find that the party had any other residence in existence or in contemplation." And he refers in the same page to an irresolution and want of fixity of purpose on the part of the person whose domicil was in contest.

In *Munro* v. *Munro* (4) Lord *Cottenham* states the rule with regard to residence: "Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention."

Lord *Westbury* in *Udny* v. *Udny* (5), in a remarkable description which he gives of the circumstances which create or constitute a domicil, states, that the "domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time." In the same case Lord *Chelmsford* says (6): "Time is always a material element in questions of domicil; and if there is nothing to counteract its effect, it may be conclusive upon the subject." And then he says: "Residence alone, however long, being immaterial unless coupled with such intention."

(1) 12 Moo. P. C. 329.
(2) 9 Ch. D. 456.
(3) Law Rep. 1 H. L., Sc. 307, 320, 321.
(4) 7 Cl. & F. 842, 877.
(5) Law Rep. 1 H. L., Sc. 441, 458.
(6) Ibid. 455, 456.

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It appears to me, therefore, that I must take into consideration the nature and character of the residence, and it appears that the intestate in this case was moving about *England*, and I think his shifting about from place to place shews a fluctuating and unsettled mind: and that the fact of residence, although for twenty-two years, standing alone without any other circumstances to shew the intention, is insufficient to warrant me in coming to the conclusion that he had intended to make *England* his home. I think in the language of Lord *Westbury* (1), quoting from the Digest (2), *quærens, quo se conferat, atque ubi constituat domicilium*, it would be difficult to say that he had any home in *England*, although, as I said in the early part of my judgment, it may be considered that, if there was an intention shewn by any other acts on his part, such as the purchase of land, if he had a family bringing the family here, buying a grave, or any other circumstance, even a slight circumstance, then I should have been warranted in coming to a different conclusion. But as the facts stand, I cannot say that those who contended for an English domicil have established their case, and that this retired old soldier did intend finally to throw off his Scotch domicil and to make himself, or rather his succession, for that is the only point of any materiality, subject to the law of *England*.

Solicitors: *B. Farquharson Watson*; *B. Fielder Watson*; *Dowse*.

(1) Law Rep. 1 H. L., Sc. 321. (2) Dig. lib. 50, t. 1, 27.

G. M.

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1885
April 15.

In re TURNER.
GLENISTER *v.* HARDING.

[1881 T. 2070.]

Evidence—Baptismal Register—Entry of Date of Birth—Declarations of deceased Father.

Although an entry in a baptismal register by the officiating clergyman of the day when the baptized child was born furnishes no proof *per se* that the child was born on the day stated, the entry will not be rejected altogether as an item of evidence upon an inquiry as to the legitimacy, from its birth before or after the marriage of its reputed parents, of the child in question.

Declarations by a reputed father contained in business letters written by one of his daughters in his name and under his dictation admitted as evidence after his death of the date of their birth upon the question of their legitimacy.

Adjourned Summons.

The action was brought for administration of the estate of *Lucretia Turner*, widow, who died on the 30th of May, 1880, by two of her alleged next of kin. By the judgment of the 5th of November, 1881, an inquiry as to her next of kin was directed, and it being alleged that *Lucretia Turner* was illegitimate, and that the gift of residue in trust for her next of kin contained in her will consequently failed, this summons to proceed under the inquiry directed by the judgment was taken out on behalf of the Plaintiffs, and now came on for hearing in Court.

It appeared that *Lucretia Turner* and her sister *Jane Kerby* were the daughters of *William Ireson* and a Mrs. *Fry*. The date of the death of *Simon Fry*, the first husband of Mrs. *Ireson*, was not ascertained, but it appeared from the marriage certificate, which was produced in evidence, that *William Ireson* and *Mary Elizabeth Fry*, widow, were married at *St. Giles, Cripplegate*, on the 29th of April, 1824.

It also appeared that *Jane* and *Lucretia*, described as the children of *William* and *Mary Ireson*, were both baptized at *St. Mary's, Whitechapel*, on the 9th of March, 1825.

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The baptismal certificate of *Jane*, which was given in evidence by the Plaintiffs, contained this entry: "When born—Nov. 19th, 1815"; and that of *Lucretia*: "When born—July 3rd, 1818."

In 1839 *William Ireson* entered into negotiations for the purchase of a farm in *Lincolnshire*, partly freehold and partly copyhold. The firm of *Smith & Wilkinson*, of *Horbling, Lincolnshire*, acted as his solicitors in the matter, and in searching the papers of the firm two draft letters of the 6th and 29th of March, 1839, were found in the handwriting of the late *Benjamin Wilkinson*, at that time a member of the firm, purporting to be addressed to *William Ireson* in reference to his proposed purchase; that of the 29th of March requesting to be informed "whether your daughters" (in whose name the purchase was proposed to be taken) "are now of age."

Two letters of the 9th of March and the 2nd of April, purporting to be written by *William Ireson*, and sworn to be in the handwriting of *Jane Ireson*, were also found. That of the 2nd of April, 1839, containing the following passage: "I have to inform you that my daughter *Jane* is twenty-four years of age on the 19th of November next, and *Lucretia* is twenty-one years of age on the 3rd July next."

A copy of this letter, sworn by her husband *Edward Kerby* to be wholly in the handwriting of *Jane*, had been found by him since her death in searching amongst old documents and papers belonging to her for the purpose of obtaining evidence in this action. He also stated that she was in the habit of writing letters for her father.

The transaction referred to in these letters was carried out by deeds of lease and release of August, 1839, and the admissions of *Jane* and *Lucretia Ireson* on the 18th and 26th of October, 1839, to the copyhold portion of the land purchased were entered on the rolls of the manor.

In November, 1843, copyhold lands in *Essex* were purchased by *William Ireson* in the names of *Jane* and *Lucretia Ireson*, to whom the surrender dated the 24th of November, 1843, was made; and the admission of *Jane* and *Lucretia Ireson* on that day was entered on the rolls of the manor of *West Ham Burnells*.

Evidence was given that according to the custom of that manor

infants were not admitted without at the same time the appointment of a guardian.

In his evidence *Edward Kerby*, who was born on the 30th of January, 1824, and was married to *Jane* in 1861, stated that he was informed by his wife, and always believed, that she was several years older than himself, and that upon several occasions she informed him that she remembered going to *Whitechapel Church* with *Lucretia* when they were both little children, and being baptized at the same time with her.

Other evidence was given for the purpose of shewing that *Lucretia* must have have been born before the marriage in 1824; and, on the other hand, that she was always acknowledged and treated in the family as the legitimate child of *William Ireson* and his wife, and that it was never suggested that she was illegitimate. In his will, dated the 13th of October, 1851, *William Ireson* throughout described *Jane* and *Lucretia* as "my daughters"; and in 1866 letters of administration to Mrs. *Ireson* were granted to *Lucretia*, who described herself on applying for the grant as one of the "natural and lawful children and one of the next of kin" of Mrs. *Ireson*.

Romer, Q.C., and *A. Young*, for the Plaintiffs, contended that *Lucretia* must be taken to have been the legitimate child of Mr. and Mrs. *Ireson*, by whom she was always recognised and treated as such, and that there was no evidence before the Court sufficient to rebut the presumption of legitimacy.

Reliance will be placed on the statement of the date of *Lucretia's* birth contained in her baptismal certificate, but no case can be found in which a baptismal certificate has been received as evidence of the date of the child's birth, and it cannot be looked at for that purpose. "It is evidence of the fact of baptism and of its date; but it furnishes no proof of the age of the party, further than that he was born at such date, even though it state the day of his birth": *Taylor* on Evidence (1); *Burghart* v. *Angerstein* (2); it being nothing more than something told to the clergyman at the time of the christening, concerning which it

(1) 8th Ed. s. 1774, p. 1507. (2) 6 C. & P. 690, 696.

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was no part of his duty, and he had no authority by law, to make an entry in the register: *Wihen* v. *Law* (1).

[CHITTY, J., referred to *Cope* v. *Cope* (2), where *Alderson*, J., received in evidence an entry in the register describing *A. B.* as the illegitimate son of his mother.]

That was a question of reputation. So far as the entry was relevant, and made by the clergyman in discharge of the duty imposed upon him by law, it is good evidence: *Stephen's* Law of Evidence (3); but as this entry was not made in discharge of any duty, and the date of birth could not have been within the knowledge of the clergymen entering the baptism in the register, it must be entirely disregarded. The letter produced by *Kerby* is not a declaration of the father, and therefore is not admissible in evidence.

Ince, Q.C., *Tremlett*, and *Jason Smith*, for other parties.

Stirling, for the Crown:—

The certificate of baptism of *Lucretia* has been put in by the other side, and the Court cannot look at the date of baptism only, but must look at the whole document. *Burghart* v. *Angerstein* (4) and *Wihen* v. *Law* were cases in which the question was not one of pedigree, but whether an entry in the baptismal register could be admitted as evidence in support of a plea of infancy. But it clearly established that in questions of pedigree, which have been always understood to be excepted cases, the strict rules of evidence will be relaxed, and that statements of deceased members of the family made *ante litem motam* are evidence to prove pedigree: *Haines* v. *Guthrie* (5) (citing *Sturla* v. *Freccia* (6) in support of this distinction). The entry in the baptismal certificate may not be conclusive evidence on the question whether *Lucretia* was illegitimate, but it will not be rejected altogether: *Cope* v. *Cope* (7); and, when coupled with the letters of 1839, the

(1) 3 Stark. 63.
(2) 1 Mood. & Rob. 271.
(3) Art. 34.
(4) 6 C. & P. 690, 696.
(5) 13 Q. B. D. 818.
(6) 5 App. Cas. 623, 640.
(7) 1 Mood. & Rob. 269, 271.

inference that she was born at the date stated in the entry, and consequently illegitimate, is irresistible.

[He was stopped.]

CHITTY, J.:—

The only question before me is as to the legitimacy of *Lucretia Turner*, who was baptized on the 9th of March, 1825, her parents having been married on the 29th of April, 1824. She died in 1880, having during her lifetime been always treated in the family as the legitimate child of her parents. The Attorney-General now contends that she is illegitimate, and certain correspondence is put in which purports to have taken place between the firm of *Smith & Wilkinson*, solicitors, and *William Ireson*, the father of *Lucretia*, in 1839. The admission of these letters in evidence was objected to on behalf of the next of kin.

[His Lordship after stating the nature of the documents proceeded:—]

The question is whether the documents are admissible. It is said that there is no evidence that the drafts were ever sent. Now, I am entitled to draw, and do draw, inferences of fact from the documents before me; and the inferences I draw are that *Jane*, the daughter, acted as *amanuensis* of her father, and that the two letters are letters written by her by her father's direction, and signed by her in his name. I also hold that the document which is produced from the lawful custody of Mr. *Kerby*, who is the widower of *Jane*, who was the surviving executrix in her turn of her father, is a document which comes out of the right custody, and is a document which apparently was preserved because it was a business letter. So that I have three documents in the handwriting of *Jane*, which, upon the facts before me, I infer were written by her by her father's authority, and the document now actually in my hands is the copy which was kept in the family, because the document was supposed to be one of importance. Looking at these letters and looking at the drafts of the solicitors' letters before me, I have no doubt that the whole form the correspondence, and that the other letters in the name of the father tally with the solicitors' letters, and shew on the face of them that the solicitors' letters, were actually received. That is the con-

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clusion at which I arrive by reading the letters in the daughter's handwriting, which refer to the same subject-matter and deal with the same matter of business as the solicitors' letters do. Now the transaction of 1839 was the purchase of some property, partly copyhold and partly freehold, by *William Ireson*, the father. He was minded to take his conveyance in the names of his daughters, and this appears on the correspondence itself. The solicitors required, as a matter of business, to know what was the age of the said daughters, and it is proved that according to the custom of the manor it was necessary that the daughters should be of age. Then comes the letter of the 2nd of April, 1839, written by *Jane* as *amanuensis* of her father in answer to one of the draft letters, asking the question as to the age of the daughters, and here the father states: "I have to inform you that my daughter *Jane* is twenty-four years of age on the 19th of November, and that *Lucretia* is twenty-one years of age on the 3rd of July next." That would make both of them born before the date at which the marriage was proved to have taken place. This is not a chance or loose statement made by the father, but a statement made as a matter of business in the transaction of that purchase, which was evidently to Mr. *William Ireson* a very considerable purchase. Therefore, seeing that the letter is in answer to a question, and seeing also that it is in the handwriting of *Jane* herself, it seems to me that it is admissible evidence, and being admitted, the weight of it is to my mind overwhelming.

Now there is another view in which these documents in *Jane's* handwriting would be admissible. It is a pedigree case, and I have *Jane's* writing in the name, I will say, of the father. It is a statement therefore by the lady who is said to be the sister of *Lucretia*, stating in substance what the father has told her; or if it is not stating in substance what the father told her, then it is her own statement, and then it is admissible as the statement of *Jane* that her sister *Lucretia* was twenty-one years old on the 3rd of July, 1839. That fact being admissible, again taking it in that way, the proof would be very strong on *Jane's* own statement. That appears to me to dispose of the case, but I will express my opinion upon the other point argued as to the admissibility of a portion of the documents which purport to be,

and in fact are, copies of the baptismal certificates of these two ladies. It was no part of the official duty of the rector of the parish in 1825, when that entry of baptism was made, to insert the date of the birth of the child. The statute which regulated those matters was 52 Geo. 3, c. 146, which came into operation in 1812, and according to decisions, which are decisions not in cases of pedigree, the statement by the rector not made in the performance of his official duty is not admissible, and would be rejected. There are two authorities which are certainly binding upon me (and which as far as I can see are not distinguishable from the present case) in which it was held that the certificates of baptism being in might be looked at for all purposes, and that a statement of the illegitimacy of the child might be read: *Morris* v. *Davies* (1); *Cope* v. *Cope* (2). It is suggested that the statement was admissible because it was evidence of reputation in the parish, but general evidence of reputation on the question of legitimacy or illegitimacy cannot be given. The grounds upon which the statement was admitted are not clearly stated in the report. In *Cope* v. *Cope* Justice *Alderson* certainly had the question argued before him, and he was in substance referred to the authorities, or at least to one of them, in which the Court had held that the certificate could not be referred to for the purpose of shewing the time of the child's birth. He said, "An entry precisely similar had been received in evidence in *Morris* v. *Davies*, where the property in dispute was of great amount, and where every available point had been taken. He should therefore receive the evidence." The ground, as I say, is not stated. It may be that the true ground is that which I am about to mention, that in these old cases where in fact hearsay evidence has been admitted for the reasons stated by Lord *Blackburn* in *Sturla* v. *Freccia* (3), it is looked upon as a statement made to the rector or the person who enters it by some member of the family. If so, that would be a proof by inference, and only by inference I agree, that some member of the family had made the statement to the rector at the time. In that way if the inference could be fairly drawn, the decision would be supported on principle. As that

(1) 3 C. & P. 215, 427. (2) 1 Mood. & Rob. 269, 271.
(3) 5 App. Cas. 623.

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point is not stated in the decisions, I hesitate of course to state it as being the ground of them. But there at any rate the two decisions stand, and I think it is impossible to distinguish the case before me (which contains a statement on the face of the baptismal certificate that *Lucretia* was born on the 3rd of July, 1818), and say it is not admissible. I say I cannot distinguish that statement from the statement on the face of the register that the child baptized was an illegitimate child. There is a similar statement made in the case of *Jane*, who was baptized on the same day, the date of *Jane's* birth being given as the 19th of November, 1815. It appears to me I am bound on the authorities I have referred to, without being bound at the same time to state the exact principle on which the evidence was admitted, beyond saying this, that it is clearly a pedigree case, and they are not cases in which strict proof is required, as in a criminal case, or in a case where it is necessary to prove that a person on a plea of infancy is an infant, or to rebut such a plea (see *Haines* v. *Guthrie* (1)). The two cases were decided as pedigree cases. Now, if the two baptismal certificates are in, they fit exactly with the letter I have referred to. The dates given in the certificates are exactly the dates that the father states in the letter which I have held was written at his dictation, or by his authority, by his daughter *Jane*. There is another ground upon which the certificates may be admissible, and that is that it is the claimant here who puts the certificates in, and it would be very difficult to withdraw that portion of the certificate from the eyes of the jury and to tell them that they must not look at it. It is contended that that would be the proper direction, but it seems to me that being in, every part of it might be referred to, though it is unnecessary so to decide it. I think Mr. *Stirling's* answer is the true one, that the document being there you must look at the whole of it and take it as it stands. At the same time I quite agree with Baron *Alderson*, if I may say so respectfully, that but little weight would be given to the statement of the date of the birth standing alone; but looking at these two documents, one in 1825, the baptismal certificate, and the other in 1839, the correspondence, I hold that the evidence is altogether incontestible.

(1) 13 Q. B. D. 818.

Of course I always regret to hold after death that anybody was illegitimate, and not the less so when everybody in the family considered that person legitimate. However, I am compelled by law to hold as I do. I am not allowed by law to do otherwise. I am not allowed in this case, more than any other, to take such a view as would really be defeating the just rights of the Crown.

Solicitors: *Kearsey, Son, & Hawes; Jennings & Son; Hare & Co.*

F. G. A. W.

In re CONEY. CONEY *v.* BENNETT.

[1882 C. 3892.]

Practice — Equitable Execution — Receiver — Rules of Supreme Court, 1883, *Order* XLII., *rr.* 4, 28—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8 [*Revised Ed. Statutes, vol. xvii., p.* 78].

Under the general power to appoint receivers given by the *Judicature Act*, 1873, s. 25, sub-s. 8, and having regard to Rules of Supreme Court, 1883, Order XLII., rr. 4 and 28, the Court has jurisdiction to enforce a judgment for payment of money into Court by a defaulting trustee, by the appointment of a receiver of his equitable interest in property in this country; and order accordingly where, from the debtor being out of the jurisdiction, service of a writ of attachment could not be effected.

THIS was a motion on behalf of the Plaintiff for the appointment of a receiver of the shares and interests in equity of the Defendant *Bennett*, now out of the jurisdiction, in the *Milford Syndicate* and of and in the property and effects belonging in equity to the persons composing such syndicate, by way of equitable execution for enforcing against the Defendant an order in this action of the 9th of April, 1883, for payment into Court within fourteen days after service of the order of a sum of £14,908 6*s.* 11*d.*, in respect of his breach of trust.

The Defendant, who was out of the jurisdiction, was entitled to certain shares in a syndicate or joint undertaking, known as the *Milford Syndicate*; and the Plaintiff, being unable to effect service of a writ of attachment, now moved for the appointment

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of a receiver of the Defendant's shares and interests in the syndicate. The question, which turned upon the construction of the Rules of Supreme Court, 1883, Order XLII., rr. 4, 28, was whether the mode of enforcing a judgment for payment of money into Court was limited to sequestration or attachment.

Romer, Q.C., and *Underhill*, in support of the motion:—

The Defendant being out of the jurisdiction, service of a writ of attachment cannot be effected upon him, and therefore we are entitled to an equitable execution against his property in this country by the appointment of a receiver for the purpose of enforcing the judgment against him for payment of money into Court: *Stanger Leathes* v. *Stanger Leathes* (1), decided under the corresponding rule of Rules of Court, 1875, Order XLII., r. 2; *Westhead* v. *Riley* (2); *Daniell's* Ch. Pr. (3); Ann. Pr. (4).

That Order XLII., r. 4, is not exhaustive so as to limit the mode of enforcing a judgment for payment of money into Court to writ of sequestration or attachment is clearly shewn by Order XLII., r. 28, which expressly preserves existing modes of enforcing judgments or orders against person or property.

S. Hall, contrà:—

Order XLII., r. 4, specifies the mode of enforcing a judgment for payment of money into Court, and the Court has no jurisdiction to step outside the rule in the absence of special circumstances. The order of the 9th of April, 1883, being simply an order for payment into Court is not an order against any person or property within Order XLII., r. 28. The proper remedy is by sequestration, which, being issuable without leave, is a less expensive remedy: *Sprunt* v. *Pugh* (5). The Court will not except in very special cases appoint a receiver when there is an ordinary legal remedy available; in this case by *fi. fa.* against the Defendant's interest in the syndicate: *Daniell's* Ch. Pr. (6).

A. W. Rowden, for *cestuis que trust.*

(1) W. N. 1882, p. 71.
(2) 25 Ch. D. 413.
(3) 6th Ed. p. 1758.
(4) Page 486.
(5) 7 Ch. D. 567.
(6) 6th Ed. p. 910.

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The Defendant is under an order to pay money into Court due from him in respect of an alleged breach of trust. The order could be enforced by attachment, but the Plaintiff's case is that the Defendant is out of the jurisdiction of the Court, and therefore cannot be attached, and that under the circumstances the cheaper and more convenient mode of enforcing the order is to obtain a receiver of certain property belonging to the Defendant. I think that this is so, and that proceedings by *fi. fa.* would be a more expensive mode of execution. The Court has a general power under the *Judicature Act*, 1873, s. 25, sub-s. 8, to appoint receivers. Moreover, Order XLII., r. 28, of the Rules of Supreme Court, 1883, plainly shews that rule 4 is in no sense exhaustive. The only question is whether the case is one in which it is "just and convenient" to appoint a receiver. I think that a receiver is under the circumstances the best remedy which can be found. I therefore make the order as asked. I have to add that the question has already been decided in *Stanger Leathes* v. *Stanger Leathes* (1). The decision of Vice-Chancellor *Bacon* is in my opinion clearly law. I have gone to the trouble of delivering judgment in the present case because the Vice-Chancellor's decision, reported as it is in a mere note, has been doubted, but in my opinion without reason.

Solicitors: *Aldridge, Thorn, & Morris*, agents for *Fenn, D'Albani, & Ellis, Newmarket; Miller & Miller; Park Nelson, Morgan & Gemmell.*

(1) W. N. 1882, p. 71.

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FOWKE *v.* DRAYCOTT.

[1883 F. 1948.]

Husband and Wife—Wife's Real Estate—Sale by Wife—Non-concurrence of Husband—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 91 [*Revised Ed. Statutes, vol. vii., p.* 515]—*Husband's Interest in Rents and Profits—Judicature Act*, 1873, *s.* 25, *sub-s.* 11 [*Revised Ed. Statutes, vol. xvii., p.* 79]—*Wife's Equity to a Settlement.*

An order in the usual form obtained under s. 91 of the *Fines and Recoveries Act*, 1833, by a married woman, empowering her to dispose of her real estate without the concurrence of her husband, does not deprive him of the common law rights which he acquired in the property by reason of the coverture.

Where, therefore, under such an order, a married woman sold and conveyed all her estate and interest in real estate, her husband refusing to join :—

Held, that the husband's common law right to the rents during the coverture remained unaffected by the wife's alienation, but that (she asserting her equity to a settlement) he was bound, whether his estate was legal or equitable, to provide for her out of the rents; and, under the circumstances, the whole of the rents were settled upon her.

G. T. AUSTIN, by his will, dated the 31st of August, 1839, appointed *J. Woodroff* and *J. Parker* executors and trustees thereof, and bequeathed and devised to them all his freehold property, farming stock, implements, and household furniture, in trust to permit his wife (the Defendant *Elizabeth Draycott*) to reside upon and enjoy his freehold property until his youngest child became of age, and upon his youngest child attaining his majority the testator directed that the whole of his property so devised and bequeathed as aforesaid should be equally divided amongst his three children, *George Austin*, the Defendant *M. E. Fowke* (formerly *Mary Emily Austin*, spinster), and *John Austin*, they paying his wife £10 a year.

The testator died on the 31st of August, 1839, and his will was duly proved by *John Parker* alone in the proper ecclesiastical Court.

The testator's freehold property comprised the farmhouse, in which he resided, with about fifteen acres of land. After his

death his widow continued to reside there, and in 1840 she married *W. Draycott*, who died in 1871.

George Austin, the son, married *Elizabeth Lomas*, and died in 1860, leaving his two children, the Defendant *Fanny Austin* and the Defendant *Mary Alton*, the wife of the Defendant *Charles Alton*, his co-heiresses-at-law.

John Austin, the youngest child of the testator, attained his majority in October, 1856, and died in February, 1871, having by his will devised (in the events which happened) his one-third share of the freehold farm to his mother, the Defendant *Elizabeth Draycott*.

The Defendant, *M. E. Fowke*, the daughter of the testator, was married to the Plaintiff, *John Fowke*, in December, 1858; but in the year 1870, in consequence of his cruelty to her, she left him and lived with her mother, the Defendant *Elizabeth Draycott*; and from that time he never in any way contributed to her support. The third share of the Defendant *M. E. Fowke* in the rents and profits of the freehold farm amounted to the sum of £6 13*s.* 4*d.* per annum, and from 1857 (when it had vested in possession) it had been duly paid to her alone without any interference from her husband. In 1882 she contracted to sell her one-third share to the Defendant *G. T. Austin*, but her husband refused to concur in the conveyance. Thereupon, on the 3rd of August, 1882, she obtained an order from the Queen's Bench Division under sect. 91 of the *Fines and Recoveries Act* empowering her "by deed to sell, dispose, or release all her estate and interest in the real estate devised by the will of *George Austin* . . . to such person or persons as she may think fit without the concurrence of her said husband;" and by deed dated the 25th of August, 1882, she conveyed her one-third share to the Defendant *G. T. Austin* in fee simple in consideration of his paying her the sum of 4*s.* per week during the remainder of her life.

In October, 1883, *John Fowke* commenced this action against all parties interested, claiming in right of his wife: (1.) to be entitled to the rents and profits of her one-third share of the property; (2.) an account of the same; and (3.) a sale of the property and division of the proceeds.

The Defendants denied the title of the Plaintiff, and set up

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the order of the 3rd of August, 1882, and the conveyance of the 25th of August, 1882. The Plaintiff replied that the order and conveyance did not affect his rights and interests in the property of his wife during the coverture. Issue was joined. This was the trial of the action.

George Miller, for the Plaintiff:—

Under this will the parties interested take legal estates, and the common law right of the Plaintiff to the rents and profits of his wife's real estate during the coverture is wholly independent of the *Fines and Recoveries Act*, and remains unaffected by the 91st section of that Act. In fact the power conferred on the wife by the section expressly reserves the rights of the husband. There is no direct authority on the point, but the observations of *Jessel*, M.R., in *Goodchild* v. *Dougal* (1) support this view. Next, the Plaintiff and his wife were not living apart by mutual consent. She left him of her own accord, and refused to return to him.

Barber, Q.C., and *Byrne*, for the wife:—

On the true construction of the 91st section the wife, on obtaining the order, had power to dispose of the entire fee as a *feme sole*. It is immaterial whether the parties are living apart by mutual consent or not; the section says "or from any other cause whatsoever." Next, under the will the parties take equitable interests. The legal estate is outstanding in the trustees, and the Plaintiff coming into this Court for equitable relief must make provision for his wife out of the rents and profits: *Sturgis* v. *Champneys* (2). Under the circumstances the whole of the rents ought to be given to her.

Byrne, for the other Defendants.

G. Miller, in reply.

NORTH, J.:—

In this case the Defendant, *Mary Emily Fowke*, the wife of the Plaintiff, *John Fowke*, was entitled under the will of *George*

(1) 3 Ch. D. 650, 653. (2) 5 My. & Cr. 97.

Thomas Austin to one third of certain real estate, subject to a charge thereon in favour of Mrs. *Draycott* of £10 for her life, and the first question which arises is as to the effect of a conveyance executed by Mrs. *Fowke*, without the concurrence of her husband, of her one-third share, upon the claim of her husband to the rents of that property during their joint lives. It is a fee simple estate, and the parties were married in 1859, and upon the marriage the husband became entitled by the law of *England* to the rents and profits of the wife's estate during the joint lives of the two. They are both still living. The wife's conveyance was executed by her after an order had been made under the 91st section of the *Fines and Recoveries Act*, dispensing with the necessity of her husband's concurrence in the deed, and a question arises, after fifty years, as to the construction of particular words in that section. The section provides that "if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind . . . or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this Act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure . . . shall be done, executed, or made by her in the same manner as if she were a female sole, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this Act) be as good and valid as they would have been if the husband had concurred." Now the question is as to the meaning of those words, "without prejudice to the rights of the husband as then existing independently of this Act." The order was made upon the ground that the husband and the wife

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were living separate and apart from each other by mutual consent, but it would have been equally good if they had been living separate and apart from each other for any other reason.

Then it is said that if the husband had concurred in the conveyance the wife's interest would have been absolutely assigned, and the entire estate would have been disposed of; and, that being so, the husband's interest, or right to the receipt of the rents and profits during the joint lives, would have come to an end. But the husband did not concur, and he says that his estate cannot be taken away from him unless there was some concurrence on his part, and that the conveyance, under the operation of the Act dispensing with his concurrence, only has the effect of conveying the wife's interest without prejudice to the rights of the husband as then existing independently of the Act. The argument for the wife is that it conveys everything, and that there is no exception of an estate vested in him.

Now the first part of this section provides for the case of a husband being a lunatic, idiot, or of unsound mind. It would be a very strange construction of the Act to say, that, although the husband's concurrence is necessary in order to enable the wife to dispose of her land, yet, if he is a lunatic, she can get an order to dispose of the land in such a way as to deprive him of the right and interest which the law of *England* gives him. Then it says, "or shall from any other cause be incapable of executing a deed." One has sometimes a case of a husband who being an infant cannot execute the deed, and that case has been often adjudicated upon in Chambers, and such a case came before the Court in *In re Haigh* (1). There a wife was entitled to certain freehold property which had been given to her for her separate use by a will. She had married an infant, and an application was made to the Court for an order to enable her to convey without his concurrence for the purpose of raising a sum of £250 by a mortgage of the property in question. The Chief Justice said, "The case falls within the words of the 91st section,—'if a husband shall, in consequence of being lunatic, idiot, or of unsound mind, or shall from any other cause be incapable of executing a deed;' therefore, if a purchaser or a mortgagee is

(1) 2 C. B. (N.S.) 198.

willing to accept the title, *valeat quantum*, he may do so. Being an infant, the husband cannot execute a valid deed." There the rule was granted. Now I think the use of the words there, "*valeat quantum*," shews clearly what the view of the Court was at that time. The Court was dealing with a case in which, *ex hypothesi*, the wife was absolutely entitled, subject to such interest as her husband had, and the only difficulty about the purchaser or mortgagee getting the estate was the want of concurrence of the husband, and the Court directed that it should be done *valeat quantum*, that is to say, the husband could not be bound himself, but the conveyance being executed by the wife, there would be a good title subject to such difficulty as arose from the husband not having conveyed his interest.

The only decision which has been cited as to the construction of the section is that of the Master of the Rolls in *Goodchild* v. *Dougal* (1), where he says this (2): "Then come the words which raise the doubt, 'and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this Act) be as good and valid as they would have been if the husband had concurred;' that is to say, the husband is to be bound so far as his concurrence was necessary to enable the wife to dispose of her interest, but any independent interest of his own is not to be affected." It is clear that the Master of the Rolls took the view that for the purpose of enabling her to convey without his concurrence such interest as she could convey without taking away his, his concurrence was to be dispensed with, but not to the extent of making him convey something which he could have conveyed without any concurrence on her part; and it seems to me that what the exception is dealing with is a case where the husband could have conveyed his own interest without asking the wife to join with him at all. Further than that, I observe that the order does not follow the exact words of the Act, but orders that the wife be at liberty by deed or surrender to sell, dispose, realize, surrender, or extinguish all her estate and interest in the real estate devised by the will. Therefore it is not a power in terms to dispose of all the estate without his concurrence; but it is all

(1) 3 Ch. D. 650. (2) 3 Ch. D. 653.

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her estate and interest, and, according to my recollection, this is the form in which these orders always are made, and I think that this form has been adopted because it expresses what is the the real and true construction of the Act.

Then the next point is, whether under the will of *George Austin*, Mrs. *Fowke* has a legal estate or an equitable estate. The will is not very formally framed: but the conclusion I have come to upon it is, that it is a devise of the fee simple to the trustees; and that the estates given to the children are equitable estates only. Although words of limitation are not used the gift is of all the property, which of course is large enough to pass the fee, and therefore a devise of all the property to the two trustees named carries the fee simple unless there is something to shew a contrary intention. I should add this also, that the real and personal estate are all dealt with in precisely the same way, and of course it was intended to give an absolute interest in the personal estate. Probably that is not in itself a sufficient reason for giving the same construction to the devise of the real estate; but still the two are given together. Then the trust is to let the wife live in the house and keep the land until the youngest child attains twenty-one, and to let her have the use of the personal property that is left after paying the debts, funeral and testamentary expenses, and the expenses of proving the will, and when the youngest child comes of age the whole property is to be equally divided "among my three children, but they to pay to my wife, if she should be living, the sum of £10 per annum during her natural life, and the property not to be sold upon any account whatever." There is to be a division of the property and not a sale, and that is to be a division by which each child is to get one third, and it is not the intention that the three children are to take as tenants in common the whole legal estate. It seems to me that the direction that it should be equally divided among the three meant that each should have a third clear; and the proper way to carry that out would be that each child should take the legal estate in the third which was given to it, but not in the two thirds given to the other two. The only way to carry that out is by having a division after the youngest child has attained twenty-one, and if the legal estate in the

trustees expired at the moment of the youngest child attaining twenty-one such a division could not be carried out, because there would not be a power of giving the legal estate in separate thirds. The conclusion I come to, therefore, is, that the legal estate did not come to an end at the moment the youngest child attained twenty-one, and if it did not then come to an end it remains in the trustees, or the representative of the survivor, and is outstanding. As Mrs. *Draycott* has been in occupation of this house between twenty and thirty years, the fact that the parties did not think it necessary to get in the legal estate on executing the conveyance does not weigh with me at all.

The conclusion I come to, therefore, is that the estate is an equitable one. I must say further, that I am not at all satisfied that it makes any difference whether the estate is legal or equitable, looking at the 11th sub-section of the 25th section of the *Judicature Act*, 1873, for I find some remarks made by Earl *Cairns* in *Pugh* v. *Heath* (1) indicating clearly his opinion that after the passing of the *Judicature Act* the rights of a legal mortgagee are to be assimilated to the rights of an equitable mortgagee rather than those of an equitable mortgagee to those of a legal mortgagee; the change being produced by the operation of the Act itself. If that is so, then it follows that the rights of a person claiming to be interested in a legal estate as against an equity of a wife to a settlement will not be larger than they would have been previously to the Act if the rights claimed had been in respect of an equitable estate instead of a legal estate. It seems to me, therefore, that the question whether this is a legal or equitable estate is now immaterial.

Then the only question left is whether the circumstances are such that I ought to give the wife the benefit of the rents of this property to the exclusion of the husband. My view is, that she has made out a case under which she is entitled to have those rents treated as her own, and free from his control. My reason is that the parties separated in 1867: they were separated for nearly a year, and then they lived together again for between two and three years or thereabouts: in 1870 a separation again took place, and from that time to this the wife has lived apart

(1) 7 App. Cas. 235.

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from the husband on her own means; that is to say, on the small amount of some £6 or £8 which her share of this property produced; she has lived on that with such assistance as she got from her mother, and there has not been any contribution by the husband towards her maintenance. The amount is so small that if she ought to have anything of course she ought to have the entirety. It is far too small to divide in any way. About two years ago, she sold her share to a person who, by way of consideration, agreed to give her 4*s.* a week during her life, that is about £10 a year. It is impossible for me to divide the payment of 4*s.* a week, and give part to her and part to the husband. The only question is, whether the husband should have all, or the wife all. I have heard the evidence as to the circumstances under which they separated, and without going into details I have come to the conclusion that the circumstances are such that the wife is beyond all question entitled to have the whole of the rents given to her.

I would just add this. There is another ground for saying the wife can set up this case here. The action seeks relief upon certain points in respect of which no relief could be got except in a Court of Equity; and therefore it seems to me a case in which the husband is not asking for merely legal rights, but appeals to the equitable side of the Court to get equitable rights. Under these circumstances the husband's action fails, and all I can do is to dismiss it with costs.

Solicitors for Plaintiff: *Dubois, Reid, & Williams,* agents for *John Close, Derby.*

Solicitors for Defendants: *Aldridge, Thorn, & Morris,* agents for *Leech, Smith, & Co., Derby.*

H. L. F.

NICHOLS to NIXEY.

PEARSON, J.

1885

May 8, 14.

[1885 N. 174.]

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (*ii.*)—*Property of Bankrupt—Power of Appointment.*

A debtor had a general power of appointment by deed or will:—
Held, that his trustee in liquidation had no power after the death of the debtor to appoint the property the subject of the power.

SUMMONS under *Vendor and Purchaser Act*, 1874.

By an indenture dated the 16th of March, 1880, made in contemplation of the marriage between *Benjamin Lockwood* (now deceased) and his widow, *Emily Lockwood*, certain freehold and leasehold public-houses, the property of *Benjamin Lockwood*, were conveyed to trustees, subject to certain mortgages, on trust for *Emily Lockwood* for life for her separate use, with remainder for *Benjamin Lockwood* for life, with remainder, in case there should be no issue of the marriage, upon trust for such person or persons, for such estates or interests, and in such manner in all respects as *Benjamin Lockwood* should by deed or will appoint, and in default of such appointment upon trust for *Mary Chilton Young*.

On the 2nd of September, 1881, *Benjamin Lockwood* filed a petition for liquidation by arrangement with his creditors under the *Bankruptcy Act*, 1869. At a general meeting of his creditors, held on the 27th of September, 1881, a resolution for liquidation was duly passed, and *Edward Nichols* was appointed trustee.

Benjamin Lockwood died on the 9th of November, 1881. There was no issue of the marriage. *Emily Lockwood* was still alive.

By an agreement dated the 17th of December, 1883, *Edward Nichols*, as trustee in liquidation of the estate of *Benjamin Lockwood*, contracted to sell the settled public-houses to *Edward Nixey* and *John Coleclough*, subject to the several mortgages existing on them, and subject to the life interest of *Emily Lockwood*.

The purchasers took out a summons under the *Vendor and Purchaser Act*, 1874, to have it declared that a good title had not been shewn.

PEARSON, J. 1885 NICHOLS TO NIXEY.

E. Beaumont, for the purchasers:—

The meaning of sect. 15, sub-sect. 4, of the *Bankruptcy Act*, 1869, is, that the trustees shall be able to exercise any general power the bankrupt could have exercised, so long and in the same way as the bankrupt could himself have exercised it; and not in any way to enlarge such power. To give the trustee a capacity to appoint after the death of the donee of the power would be to create a new power, and forfeit the property of the reversioner. The *Bankruptcy Act* was not intended to take away the rights of strangers.

F. J. Wood, for the vendor:—

The Act places the trustee in the same position, with regard to such a power as this, as the bankrupt was at the commencement of the bankruptcy; and the subsequent death of the bankrupt does not affect the capacity to exercise a general power exercisable by act *inter vivos*, which is vested in the trustee as part of the property of the bankrupt.

E. Beaumont, in reply.

PEARSON, J.:—

The trustee says that, although *Lockwood* is dead, he can exercise the power of appointment that was vested in *Lockwood*, it being a general power, and one which he could have exercised for his own benefit. The question depends entirely on the 15th section of the *Bankruptcy Act*, 1869. The question is whether that section keeps alive or reinstates the power now *Lockwood* is dead and certainly can no longer exercise it himself? The difficulty arises from the use of the words "as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy." It is said these words enable the trustee at any time to exercise a power the bankrupt had at the commencement of the bankruptcy, and that therefore at the present moment *Nichols* can make a good title. I think that cannot possibly be the meaning. I come to the conclusion that the power was intended to be exercised in the same way as the bankrupt might exercise it, and that all that is given to the trustee in bankruptcy is a

capacity to do that to the same extent and in the same manner as the bankrupt might have done, and no other capacity. Supposing a power had been given to the bankrupt to be exercised with the consent of a third person, I do not apprehend that in that case the trustee could have exercised that power without the consent of the third person. Supposing a power had been given to be exercised during a limited time, the trustee could not, after the expiration of that period, have exercised it. To be able to do so would not be a capacity to exercise the power, but to exercise a different power. And inasmuch as the power in this case came to an end on the bankrupt's death, I think the power no longer exists, and whatever the capacity of the trustee means, it is absolutely impossible for him to exercise a non-existing power. I therefore determine that the power, not having been exercised during the life of the bankrupt, the trustee cannot now make a good title under the power.

Solicitors: *Bell, Brodrick & Gray*, agents for *Todd & Harrison, Hartlepool; Harvey & Capron*, agents for *Proud, Bishop Auckland.*

D. P.

In re CHAPMAN AND HOBBS.

[1885. C. 819.]

Vendor and Purchaser—Enlargement of Long Term into Fee—"Rent having no Money Value"—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 65.

Land was demised for a term of 500 years from Michaelmas, 1646, at the yearly rent of "one silver penny, if lawfully demanded":—

Held, that this rent was a "rent having no money value," within the meaning of sect. 65 of the *Conveyancing Act*, 1881, and that the owner of the term in 1884 had power under that section to enlarge the term into a fee.

SUMMONS under the *Vendor and Purchaser Act*, 1874.

On the 25th of August, 1884, *Susan Emma Chapman*, a widow, entered into an agreement with *George Hobbs* for the sale to him of some property at *Maidenhead*, part of which was freehold and

PEARSON, J. 1885 *In re* CHAPMAN AND HOBBS.

part leasehold. The agreement stated that the leasehold part was held by the vendor for the residue of a term of 500 years from Michaelmas, 1646, at the yearly rent of one silver penny, if demanded, but that the vendor, in pursuance of the power given to her by the *Conveyancing Act*, 1881, would, on or before completion, execute a deed whereby she would enlarge the term into a fee simple.

The lease, in fact, reserved during the first three years of the term the yearly rent of 20*s.*, to be paid "at the feast day of St. Michael the Archangel, or within five days after the said feast day," and, during the rest of the term, "one silver penny at the feast day of St. Michael the Archangel, only if it be lawfully demanded" of the lessee, his executors, administrators, or assigns.

The purchaser afterwards took the objection that the vendor had no power under sect. 65 of the Act to enlarge the term into a fee, on the ground that the rent of one silver penny had a money value.

The summons was taken out by the purchaser to determine the question. It asked a declaration that the term could not be enlarged into a fee in pursuance of sect. 65 of the Act; that the vendor had not shewn a good title; and that the purchaser was entitled to a return of his deposit.

Two surveyors deposed that the rent of a silver penny was of no value whatever, and that a purchaser could not be found for the same at any price. The vendor's solicitor deposed that he had been informed and believed that the rent had never been paid or demanded since the vendor became possessed of the property, which was about fourteen years ago.

Mulligan, for the Purchaser:—

Sect. 65 (1) of the *Conveyancing and Law of Property Act*, 1881, does not apply; the rent of a silver penny is not a merely nominal

(1) Sect. 65 provides that (1) "Where a residue unexpired of not less than 200 years of a term which, as originally created, was for not less than 300 years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the rever-

rent, like a peppercorn. It has some money value though it may be very small. In *In re Smith and Stott* (1) *Fry*, J., held that a

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sion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

"(2.) Each of the following persons (namely) (*inter alios*):

"(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term . . . shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple."

(1) Fry, J., Feb. 22, 1883.

In re SMITH AND STOTT.

[1882 S. 4845.]

THIS was a summons under the *Vendor and Purchaser Act*, 1874.

On the 11th of February, 1882, *Charles Stott* entered into a contract with *Augustus Smith* for the sale to *Smith* of some land at *Leeds*, which was described in the contract as freehold. The time fixed for the completion of the contract was the 25th of March, 1882. It afterwards appeared that part of the land was leasehold, and that that part was held (with other land) for a term of 1000 years from February, 1607, at a yearly rent of 3*s.*, and that by an arrangement between the leaseholders this rent had been charged on the other land comprised in the lease in exoneration of the leasehold part comprised in the present contract. The purchaser declined to complete, unless he was satisfied by the vendor that the value of the property would not be affected by the fact that part of it was leasehold. Ultimately, on the 28th of October, 1882, the purchaser took out this summons, asking for a declaration that the vendor had not shewn a good title to the land, and that the vendor might be ordered to repay the deposit, with interest, and to pay a reasonable sum for the costs and expenses incurred in the investigation of the title, and to pay the costs of the summons. The summons came on for hearing on the 27th day of January, 1883, when Mr. Justice *Fry* made an order allowing the summons with costs, unless, within four days, the vendor's solicitors should give notice that they intended to prove the vendor's title, in which case the summons was to be restored to the paper for hearing at the cost of the vendor. The notice was given, and the summons came on to be heard again on the 22nd of February, 1883. The vendor had not made out a freehold title.

Warmington, Q.C., for the purchaser:—

The purchaser is entitled to be released from his contract, and to have his deposit returned: *In re Metropolitan District Railway Company and Cosh* (13 Ch. D. 607); *In re Higgins and Hitchman's Contract* (21 Ch. D. 95).

W. Latham, for the vendor:—

There is no jurisdiction upon a sum-

PEARSON, J. 1885 *In re* CHAPMAN AND HOBBS.

yearly rent of 3*s.* had a money value, and that the section intended "a rent which, when received, has no money value."

Gent, for the Vendor:—

A "rent having no money value" means a rent which is not saleable. The evidence is distinct that this rent is not saleable, and it is not contradicted. If the rent of a silver penny had originally a money value, it ceased to have that value when the coining of silver pennies was discontinued. Silver pennies are now coined only for the purpose of "Maunday" money.

Mulligan, in reply:—

If a rent of a silver penny has no money value, where is the line to be drawn? The principle would apply equally to a rent of 3*s.* for a larger estate.

PEARSON, J.:—

I desire not to express any opinion as to the case before Mr. Justice *Fry*, or to suggest any doubt as to the correctness of

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mons under the *Vendor and Purchaser Act* to order a return of the deposit: *In re Burroughs* (5 Ch. D. 601).

The vendor can enlarge the term into a fee simple under sect. 65 of the *Conveyancing Act*, 1881. The rent of 3*s.* has no money value. If time is given the vendor will be able to prove that the rent has not been paid. Time is not made of the essence of the contract.

Warmington, in reply.

FRY, J., said that the first question was whether the rent of 3*s.* could be considered as a rent "having no money value," within the meaning of sect. 65 of the *Conveyancing Act*, 1881. He thought it could not, for he understood those words as meaning a rent which, when received, had no money value. He then decided that there was jurisdiction under sect. 9 of the *Vendor and Purchaser Act* to order a return of the deposit, with interest. He had made such an order in *In re Metropolitan District Railway Company and Cosh*, and the Court of Appeal affirmed his decision. He thought he ought to grant the vendor further time to make out a title. He would allow him a month longer. If a good title was not then shewn a peremptory order would be made.

1883. March 21. An order was made declaring that the vendor had not shewn a good title to the land, and ordering that the vendor do concur in procuring the return of the deposit to the purchaser, with interest, and that the vendor do pay to the purchaser his costs of the application.

Solicitors: *Crawley & Arnold*; *Lambert, Petch, & Shakespear.*

his decision. There the rent of 3*s.* appears to have been an absolute one; here the reservation is of a yearly rent of "one silver penny, if lawfully demanded." To my mind, by the use of the words "if lawfully demanded" the framer of the lease has shewn that he considered the rent of a silver penny to be of no money value, and that the intention was that it might be demanded only for the purpose of keeping alive evidence of a tenancy if such evidence should be required. I think I am entitled to say that on the face of the lease itself there was no intention to reserve a rent having any money value. And the fact that the silver penny has since disappeared from the current coinage of the realm does not diminish the force of this consideration. I think that the case is clearly within the spirit of the Act, and that I should indeed be forgetting the rule which forbids me *hærere in cortice* if I were to say that the section does not apply. In my opinion the rent had not originally a money value, and it has none now. I must, therefore, declare that a good title has been shewn.

Solicitor for Purchaser: *W. Osborne Jones*, agent for *F. R. Spender, Maidenhead.*

Solicitors for Vendor: *Layton, Son, & Lendon.*

W. L. C.

PEARSON, J.

1885

June 2.

BIRD *v.* EGGLETON.

[1884 B. 2483.]

Railway Company—Sale of Superfluous Land—Land previously subject to statutory Prohibition against building.

An Inclosure Act passed in 1806 provided that no buildings should at any time thereafter be erected on a certain strip of land. In 1865 a railway company under their statutory powers acquired a portion of the strip of land for the purposes of their undertaking. A part of the land thus acquired became superfluous land, and the company in 1868 sold and conveyed the superfluous part to a purchaser who demised it to the Defendant. The Defendant in 1885 commenced building on the land:—

Held, that the land acquired by the company was freed from the prohibition of building only for the purposes of the company's undertaking, and that, when part of it was sold as superfluous land, the prohibition of building revived in respect of that part.

An injunction to restrain the Defendant from building on the land in contravention of the provisions of the Inclosure Act was granted at the suit of an owner of adjoining land.

MOTION to restrain the Defendant from building on certain land at *Brixton*, in the county of *Surrey*.

By an Act 46 Geo. 3, c. lvii., provisions were made for the inclosure of certain common land at *Brixton*. By sect. 1 Commissioners were appointed for carrying out the purposes of the Act. By sect. 17 it was provided that "no buildings or erections above the surface of the earth shall at any time hereafter be erected upon the narrow strip of waste land lying in front of *Brixton Place* . . . and, in case any such buildings or erections shall at any time or times hereafter be built, contrary to the true intent and meaning of this Act, it shall be lawful for any person or persons who shall be injured or affected thereby to remove or abate the same, or otherwise to proceed against the person or persons so offending in like manner as in cases of nuisance." Sect. 39 provided that "the charges and expenses of obtaining, passing, and executing this Act, or such part or parts thereof as the said Commissioners shall direct, shall be paid by the several persons to whom any allotments shall be made by virtue of this Act in proportion to the value of such allotments, or the same

charges and expenses, or any part thereof, and also any other money required or authorized to be paid by the said Commissioners for the purposes of this Act, shall and may be raised by sale of such part or parts of the said common lands hereby directed to be divided, allotted, and inclosed as the said Commissioners shall in their judgment think most proper."

The strip of waste land lay between the *Brixton Road* and the houses in *Brixton Place*. After the passing of the Act the Commissioners sold and allotted the portions of the waste land opposite the houses in *Brixton Place* respectively to the respective owners of those houses, and the portions of land so allotted were respectively inclosed and converted into forecourts or gardens to the houses in *Brixton Place*. In the year 1865 the *London, Chatham, and Dover Railway Company*, under the powers of their special Act, 27 & 28 Vict. c. cxcv., purchased, for the purposes of their undertaking, several of the houses in *Brixton Place*, including the forecourts or gardens thereof, one of those houses being known as No. 14, *Upper Brixton Place*. The company did not require this house for the purposes of their undertaking, and on the 7th of April, 1868, they sold and conveyed it (including the forecourt or garden) to *J. W. Clark* in fee. The conveyance contained no notice of the provisions of sect. 17 of the Inclosure Act. On the 6th of June, 1868, *Clark* demised the house No. 14, *Upper Brixton Place*, with the forecourt or garden, to the Defendant, for a term of twenty-one years from the 25th of March, 1868. The lease contained no notice of the provisions of sect. 17 of the Inclosure Act.

The Defendant had recently commenced building a shop on the forecourt of his house. *E. Bird*, one of the Plaintiffs, was the owner of some land situate on the side of the *Brixton Road* opposite to *Brixton Place; J. G. Albert*, the other Plaintiff, was the occupier of one of the houses in *Brixton Place*. The Plaintiffs sued on behalf of themselves and all other persons entitled to the benefit of the Inclosure Act, and they claimed an injunction to restrain the Defendant from permitting any buildings or erections, raised or caused to be raised by him above the surface of the earth on the narrow strip of land (formerly waste land) lying in front of *Brixton Place*, to remain, and from raising or causing to

PEARSON,J. 1885 BIRD v. EGGLETON.

be raised any buildings or erections above the surface of the earth on the same strip of land in contravention of the Act.

There was evidence that since the passing of the Inclosure Act the character of the neighbourhood of *Brixton Place* had entirely changed. At that time the neighbourhood was nearly open country, there being only a few private houses with large gardens. Of late years the neighbourhood had become a place of business, and most of the houses had been converted into shops, and it was difficult to find tenants for the houses in *Brixton Place* as private houses, though they would let at good rents as shops. Shops had already been built on the forecourts of some of the houses in *Brixton Place*.

Cozens-Hardy, Q.C., and *J. F. Hole Bethell*, for the Plaintiffs:—

The railway company, by their purchase under their statutory powers, acquired a right to build on the land for the purposes of their railway and works. The superfluous land, which was land not required for those purposes, was not released from the prior statutory prohibition of building. The original prohibition revived on the sale as superfluous land being made.

Cookson, Q.C., and *Seward Brice*, for the Defendant:—

The effect of the purchase by the company was to do away altogether with the statutory prohibition, so far as regards that part of the strip of waste land which they purchased. The company could have built on the land for the purposes of their undertaking, and, when they sold part of the land as superfluous land, the purchaser acquired it free from the statutory prohibition of building.

[PEARSON, J., referred to *Norton* v. *London and North Western Railway Company* (1).]

On the true construction of the Inclosure Act the prohibition of building was not intended to apply after the piece of waste land should have been sold by the Commissioners. At any rate, the state of the neighbourhood has been entirely altered in the course of years, and the restriction is not now applicable.

(1) 9 Ch. D. 623.

Moreover, the Plaintiff *Bird* is not entitled to sue; the restriction was intended only for the benefit of the owners or occupiers of houses in *Brixton Place*.

PEARSON, J.

1885

BIRD v. EGGLETON.

PEARSON, J. (after stating the facts, continued):—

In my opinion, the restriction imposed by sect. 17 of the Act is a restriction in perpetuity, and, being a statutory restriction, it can only be removed from the land by another Act of Parliament. At the present moment the Act is in full force. Whether we agree with the wisdom of it, or whether we think that our ancestors would have done better if they had considered themselves less capable of looking into futurity and legislating for generations many removes from them, is a matter which is absolutely unimportant, because the Court can only construe the Act.

It appears that at the time when it was passed this place was almost, if not quite, open country, and that which is now the *Brixton Road* was then a country drive. The houses in *Brixton Place* were then built, I suppose, for the enjoyment of country air and quiet, and they had in front of them this strip of waste common land, and, so far from thinking that this provision was inserted in the Act *per incuriam*, my conclusion, from the circumstances of the case, would be that the owners of the houses in *Brixton Place* were just as anxious as any one else that this clause should be in the Act, and that it was distinctly intended for their protection, probably more than for the protection of any other persons. However, there it is, and, although the Act remains unrepealed, the Defendant nevertheless says he is entitled to treat it as repealed.

He says, first, that there has been a great alteration of the neighbourhood, and that this Court will not restrain him from doing that which is perfectly suitable to the present character of the locality. The Court has no power to set aside the Act in that way. The Court must be guided by the Act, and, finding that the Act authorizes any person who is injured or affected by what the Defendant is doing to come to the Court in order to restrain the Defendant from so doing, the Court is bound to apply the remedy which the Act points out.

Again, it is said that sect. 17 does not mean what it says,

PEARSON, J. 1885 BIRD v. EGGLETON.

because by sect. 39 power was given to the Commissioners to sell the strip of waste land, and to apply the proceeds of sale in paying the expenses of the award, and it is said that they were empowered to sell the land freed from all the restrictions of the 17th section. There is no direction that the sale must be made only to the then owners of houses in *Brixton Place*, and I can find nothing in the Act to authorize me to remove the restriction. The words of sect. 17 are perfectly plain. Sect. 39 is perfectly capable of a very intelligible meaning in connection with sect. 17. That which was done shews what was in the year 1806 understood to be the meaning. This strip of waste land was sold in lots as additional forecourts to the houses in *Brixton Place*, and, so far were those persons from thinking that it was free from the fetter, that I cannot find that from that time to the present, when the Defendant is beginning to build, any buildings in contravention of the Act of Parliament have been placed on this part of the strip of land. So it has remained for nearly eighty years. That being so, I am of opinion that the Plaintiffs are entitled, so far as the Inclosure Act is concerned, to restrain the Defendant from building on the land.

But this very curious point has been raised. It appears that in 1865 the *London, Chatham, and Dover Railway Company* obtained by their special Act the right to take a portion of this strip of waste land which had been allotted and sold in the way which I have mentioned. They took it, and it turned out that they had taken more than they absolutely required for the purposes of their railway, and in process of time part of it turned out to be superfluous land, and they were bound to sell it. They did sell it, and Mr. *Eggleton's* lessor bought it, and the Defendant says that he bought it free from the restriction imposed by sect. 17 of the Inclosure Act. That raises the question, what is the effect of a railway company buying under their statutory powers land which is, under a prior Act, subject to certain restrictions which, *ex necessitate*, will not bind the company as regards the purposes of their undertaking, when a portion of the land which they have thus bought has become superfluous land, and they resell it—is the land so resold subject to the restrictions to which it was originally subject? or has the intervening purchase by the railway company

released the land from the restrictions? To my mind the acquisition of land by a railway company under statutory powers is a very different thing from its acquisition by an ordinary purchaser in fee simple. The land purchased by a railway company under the compulsory powers of their special Act is purchased with one object and one intention only, and the company are restrained by the Act from using it for any other than that particular purpose. The company are entitled to use the land for all the purposes of their railway, whatever they may be, but beyond that they have not the rights of an ordinary owner in fee simple. They can neither use it themselves, nor give any one else the right to use it, for any purpose except the necessary purposes of the railway. When this land became superfluous land the company were under the obligation of selling it as land which they did not require. If they did not take it, it was subject to the restrictions contained in the Inclosure Act, and to my mind, when it was resold by the company, because they did not want it, it became again subject to the same fetter to which it was subject when they took it, and they could only sell it subject to that fetter, and a person taking it from the railway company acquired no better title to it, and no right to use it in any other way, than any person would have had who had bought it without the intervention of the railway company. Arriving at that conclusion, I must hold that the Defendant is acting in express violation of sect. 17 of the Inclosure Act, and therefore I am bound to restrain him from so using the land. Of course I cannot grant a mandatory injunction now.

Solicitors for Plaintiffs: *Horne & Birkett.*
Solicitor for Defendant: *Thomas Cray.*

W. L. C.

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28 Ch. D.

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ARREST—Writ ne exeat regno - - 341
See NE EXEAT REGNO.

ASSIGNMENT OF DEBT—*Equitable Assignment*—*Order for Payment of Money*—*Specific Fund*—*Practice*—"*Point of Law*"—*Dismissal of Action*—*Rules of Supreme Court*, 1883, *Order* XXV., *rr.* 2, 3.] An order by a creditor to his debtor to

ASSIGNMENT OF DEBT—*continued.*
pay a sum of money to a third person is not an equitable assignment unless it specifies the fund or debt out of which the payment is to be made.—Thus, where A., a builder, being a debtor to the Plaintiff, P., but a creditor of the Defendant, handed to P. the following order signed by A. and addressed to the Defendant, who received due notice thereof: "Please pay P. the amount of his account, £42 14*s.* 6*d.* for goods supplied":—*Held*, that the order did not operate as an equitable assignment.—The decision of the Judge on a "point of law" raised in an action under Rules of Supreme Court, 1883, Order XXV., rule 2, having substantially disposed of the whole action, the action was, under rule 2, dismissed with costs. PERCIVAL *v.* DUNN - - - - 128

ASSIGNMENT OF LEASE—Indemnity - 254
See LANDLORD AND TENANT.

AUCTIONEER—Commission - - 790
See SOLICITOR. 5.

BALANCE ORDER—Executor of shareholder—Retainer - - - - 934
See EXECUTOR. 2.

BANKER—Overdrawn account - - 902
See BUILDING SOCIETY. 2.

BANKRUPTCY—*Assets—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (*ii.*)—*Property of Bankrupt—Power of Appointment.*] A debtor had a general power of appointment by deed or will:—*Held*, that his trustee in liquidation had no power after the death of the debtor to appoint the property the subject of the power. NICHOLS TO NIXEY - - - - 1005

2. —— *Disclaimer by Trustee in Liquidation—Lease—Covenant not to use Hay, Straw, &c.—56 Geo. 3, c. 50, s. 11—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 119, 125.] The enactment in statute 56 Geo. 3, c. 50, s. 11, that the assignee of any bankrupt shall not take or use any hay, straw, &c., on any farm of the bankrupt in any other way than the bankrupt ought to have done, is still in force, and applies to a trustee in bankruptcy or liquidation under the Bankruptcy Act, 1869.—A lessee was bound by the covenants in his lease not to sell the hay, straw, &c., grown on his farm without the consent of the landlord. The lessee became a liquidating debtor under the Bankruptcy Act, 1869, s. 125, and the trustee in the liquidation disclaimed the lease:—*Held*, that the trustee was bound by 56 Geo. 3, c. 50, s. 11, notwithstanding the disclaimer, and an injunction was granted to restrain him from selling the hay, straw, &c., grown on the farm. LYBBE *v.* HART - - C. A. 8

3. —— *Transfer to Court of Bankruptcy—Administration of Insolvent Estate—Discretion of Court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125.] The power given by sect. 125 of the Bankruptcy Act, 1883, to transfer the proceedings in an action brought for the administration of an insolvent estate to the Court of Bankruptcy, is a discretionary one, and it will not be exercised where the estate is small, the number of creditors

BANKRUPTCY—*continued.*
is small, and considerable expense has been already incurred in Chambers in the proceedings under an administration judgment.—*Semble*, that an application for transfer can only be made by a creditor who has absolutely proved his debt. *In re* WEAVER. HIGGS *v.* WEAVER - 236

BAPTISMAL REGISTER—Evidence - 985
See EVIDENCE.

BARE TRUSTEE—Vendor and Purchaser Act
See VENDOR AND PURCHASER. 2. [693

BILL OF COSTS.
See Cases under SOLICITOR.

BILL OF EXCHANGE—*Specific Appropriation—Marginal Advice—Stoppage in transitu—Notice to Consignees to hold Proceeds of Goods.*] A firm at Liverpool and a firm at Pernambuco employed B. as their agent at New York. According to their course of business the firm at Pernambuco received orders from persons there to purchase goods at New York. The firm instructed the Liverpool firm, who instructed B. B. then purchased the goods in New York and shipped them to the firm at Pernambuco with the bills of lading. B. drew bills on the Liverpool firm to pay for the goods, but not for the precise amount of the shipments, and sold the bills in New York. B. advised the Liverpool firm of the bills, and with the advice forwarded a statement of his account with them. To each bill was attached a counterfoil headed "Advice of draft," and containing a memorandum of amount of the bill and the name of the drawer, with the words "Against shipments *per* (naming the vessel). Please protect the draft as advised above." The Liverpool firm on the bills being presented to them for acceptance detatched the counterfoils and kept them in their own possession. The Plaintiffs were the holders for value of bills drawn on the Liverpool firm in accordance with this course of dealing, the goods having been shipped by B. to the Pernambuco firm and the bills of lading being also sent to that firm.—On the 10th of June, 1879, the Liverpool firm stopped payment, and on the same day B. telegraphed to the Pernambuco firm as follows: "Having pledged documents and shipments (naming the vessel) hold proceeds for P. & Co. (the Plaintiffs)." The ship arrived on the 11th of June, but the bills of lading had been previously delivered to the purchasers of the goods.—The three bills having been dishonoured by the Liverpool firm, the Plaintiffs brought an action against the Pernambuco firm claiming to have the bills paid out of the proceeds of the goods as having been specifically appropriated to meet the bills, and also relying on the telegram as having stopped the goods in transitu:—*Held* (affirming the decision of Bacon, V.-C.), that there was no specific appropriation of the goods either by the course of dealing or by the "advice of draft" attached to the bills.—*Frith* v. *Forbes* (4 D. F. & J. 409) distinguished.—*Robey & Co.'s Perseverance Ironworks* v. *Ollier* (Law Rep. 7 Ch. 695) approved.—*Held*, also that the telegram to the Pernambuco firm was not effectual to stop the goods in transitu.—*Quære*, whether under any circumstances a notice to stop goods in transitu can be effectual, if addressed to the con-

BILL OF EXCHANGE—*continued.*
signees only, and not to the owner or master of the ship which carries them. PHELPS, STOKES & Co. *v.* COMBER - - - - - **C. A. 813**

2. —— *Specific Appropriation—Equitable Assignment—Direction on Bill to charge it to Account of Cargo as advised—Contemporaneous Letter of Advice.*] A. purchased from B. & Co. in America a bill of exchange dated the 5th of August, 1875, payable sixty days after sight, for £2500 drawn upon K. in London, on the face of which was a direction "to charge the same on account of cheese per *Britannic* and lard per *Greece* as advised," and on the same day B. & Co. wrote to K. a letter of advice, inclosing bills of lading for the cheese and lard, and informing K. that as against these they valued on him at sixty days' sight for £2500 favour A. The bill was not accepted, K. having heard that B. & Co. had suspended payment on the 7th of August; but, on the arrival of the consignments in England, K. took possession of them and realised them, receiving the proceeds, out of which he claimed to retain a balance due to him on the general account between him and B. & Co. —From the evidence as to the course of dealing between A. and B. & Co., it appeared that B. & Co. had for many years previously been in the habit of consigning American produce to K., and drawing bills on him in a similar form to that of the 5th of August, but that there had not been any practice of specifically appropriating the remittances to meet any particular bills.—A. brought an action against K. and the trustee in bankruptcy of B. & Co. claiming to be entitled to a charge on the proceeds of the cheese and lard in priority to all other persons. No question was raised as between K. and the trustee in bankruptcy as to their respective rights:—*Held*, by the Court of Appeal (affirming the decision of Chitty, J.), that A. was not entitled to the charge claimed, either (1.) on the ground that the direction on the face of the bill of exchange operated as an equitable assignment; or (2.) that on the authority of *Frith* v. *Forbes* (4 D. F. & J. 409), the letter of advice created a specific appropriation of the remittances to meet the bill in favour of B. & Co., the benefit of which was transferred to A. by the direction on the bill of exchange.—The case of *Frith* v. *Forbes*, if and in so far as it intended to lay down that, as a general principle of law, such a letter of advice created a specific appropriation in favour of the consignors and drawers of the bill, the benefit of which was transferred by the direction on the bill to the bill-holders—is erroneous, and must not be followed. BROWN, SHIPLEY, & Co. *v.* KOUGH [C. A. 848

BIRTH—Date of—Baptismal register - **985**
See EVIDENCE.

BONUS—Whether capital or income - **635**
See COMPANY. 1.

BORROWING POWERS—Building society
See BUILDING SOCIETY. 1, 2. [182, 902

BUILDING—Prohibition against - - **1012**
See LANDS CLAUSES ACT.

BUILDING SOCIETY—*Borrowing Powers*—6 & 7 *Will.* 4, *c.* 32—"*Monthly Subscriptions and Deposits on Loans*"—*Liquidation—Priority of Depositors to Members.*] A building society was

BUILDING SOCIETY—*continued.*
established in July, 1865, under the provisions of the 6 & 7 Will. 4, c. 32, "for the purpose" as stated in rule 1, "of raising by monthly subscriptions, and deposits on loans, a fund to make advances to members of the value of their shares to enable them to erect or purchase" houses, &c. The directors received moneys on deposit from non-members, and gave certificates for them. The society went into liquidation in 1882:—*Held*, that rule 1 sufficiently expressed the power to receive deposits on loans; that the persons who deposited moneys by way of loan were outside creditors and entitled in the winding-up of the society to be paid in priority to the members of all classes, including those who had given notice of withdrawal before the commencement of the winding-up. *In re* MUTUAL AID PERMANENT BENEFIT BUILDING SOCIETY - - - **182**

2. —— *Borrowing Powers — Overdrawing Bankers' Accounts—Action for Account—Money paid in Mistake of Law—Ratification—Payment to withdrawing Members—Priority of Securities.*] A benefit building society which had never been incorporated, and had no power to borrow money, was allowed by its bankers to make large overdrafts, and the directors of the society signed a memorandum giving the bankers a lien upon all the society's deeds, to secure all moneys which from time to time might be owing by the society to the bankers on the balance of the banking account. Annual balance-sheets, shewing the amounts due to the bankers, were sent to all the members of the society, and adopted at the annual meetings. The society was afterwards to be wound up, and the overdrafts were ultrà vires, being a borrowing unauthorized by the rules, the official liquidator brought an action against the bankers to recover all moneys which had been paid to them by the society and applied by the bankers in discharge of their loan to the society:—*Held*, that it was no answer to such action that the moneys had been so applied by the order of the directors of the society under a mistake of law as to their power to borrow, since the acts of the directors, both in borrowing and in directing the application of the moneys, were unauthorized and not binding on the society. *Held*, also, that there had been no ratification of such acts of the directors by all the members of the society, as such ratification could not be implied from merely seeing and not questioning the balance-sheet accounts which had been sent to them, and no ratification of such acts by the majority would bind the minority of the members. The bankers, were, however, allowed to stand in the place of withdrawing members of the society who had been paid on notice of withdrawal out of moneys so advanced by the bankers, and to receive the amounts which would be payable to such members if they had not been paid off. The bankers were also to have the benefit of securities obtained by the society by means of overdrafts allowed by the bankers, and to have the benefit of such securities according to their order of priority without being postponed until after other securities granted to the society. BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY *v.* CUNLIFFE, BROOKS & Co. - - - - **C. A. 902**

CAPITAL—Income—Bonus - - - 635
See Company. 1.

—— Reduction of - - - - 683
See Company. 7.

CASES— *Bates* v. *Johnson* (Joh. 304) questioned.
See Mortgage. 5. [954

—— *Baynton* v. *Collins* (27 Ch. D. 604) followed
See Husband and Wife. 1. [177

—— *Beavan* v. *Oxford (Earl of)* (6 D. M. & G. 492) followed - - - 527
See Judgment. 2.

—— *Brook* v. *Badley* (Law Rep. 3 Ch. 672) approved and followed - - 947
See Charity 2.

—— *Busk* v. *Aldam* (Law Rep. 19 Eq. 16) observed upon - - - - 535
See Power. 1.

—— *Colonial Trusts Corporation, In re* (15 Ch. D. 465) distinguished) - - 736
See Company. 3.

—— *Cooke* v. *Chilcott* (3 Ch. D. 694) overruled on one point - - - - 750
See Covenant.

—— *Crawshaw* v. *Crawshaw* (14 Ch. D. 817) considered - - - - 142
See Will. 4.

—— *Crowther* v. *Thorley* (32 W. R. 330) followed
See Company. 7. [1

—— *Eade* v. *Jacobs* (3 Ex. D. 335) explained 29
See Practice. 9.

—— *Farrow* v. *Austin* (18 Ch. D. 58) followed
See Practice. 5. [495

—— *Ferrier* v. *Jay* (Law Rep. 10 Eq. 550) observed upon - - - 535
See Power. 1.

—— *Florence Land and Public Works Company, In re* (10 Ch. D. 530) distinguished 736
See Company. 3.

—— *Frith* v. *Forbes* (4 D. F. & J. 409) distinguished - - - 813, 848
See Bill of Exchange, 1, 2.

—— *Harris, In re* (15 Ch. D. 561) explained 947
See Charity. 2.

—— *Hoffmann* v. *Postill* (Law Rep. 4 Ch. 673) explained - - - - 29
See Practice. 9.

—— *Holmes* v. *Buckley* (1 Eq. C. Ab. 27) discussed
See Covenant. [750

—— *Hopkinson* v. *Rolt* (9 H. L. C. 514) followed
See Mortgage. 1. [149

—— *Horbury Bridge Coal Iron and Waggon Company, In re* (11 Ch. D. 109) observed upon - - - - - 159
See Company. 6.

—— *Humble* v. *Shore* (7 Hare, 247; 1 H. & M. 550, n.) considered - - - 142
See Will. 4.

—— *Jewis* v. *Lawrence* (Law Rep. 8 Eq. 345) questioned - - - - 893
See Will. 3.

—— *Jones* v. *Monte Video Gas Company* (5 Q. B. D. 566) explained - 307
See Practice. 16.

CASES—*continued.*

—— *Lightfoot* v. *Burstall* (1 H. & M. 546) considered - - - - 142
See Will. 4.

—— *Lowndes* v. *Davies* (6 Sim. 468) dissented from - - - - - 29
See Practice. 9.

—— *Malcolm* v. *Charlesworth* (1 Keen, 63) approved - - - - 702
See Registry Acts.

—— *Morland* v. *Cook* (Law Rep. 6 Eq. 252) explained - - - - 750
See Covenant.

—— *Peacock* v. *Burt* (4 L. J. (N.S.) (Ch.) 33) not extended. - - - 954
See Mortgage. 5.

—— *Pocock's Policy, In re* (Law Rep. 6 Ch. 445) observed upon. - - - 535
See Power. 1.

—— *Powell's Trusts, In re* (39 L. J. (Ch.) 188) discussed and not followed - 521
See Power. 2.

—— *Randall* v. *Russell* (3 Mer. 190) considered
See Renewable Lease. 1. [673

—— *Reg.* v. *D'Oyley* (12 Ad. & E. 139) followed
See Company. 6. [159

—— *Robey and Co.'s Perseverance Ironworks* v. *Ollier* (Law Rep. 7 Ch. 695) approved 813
See Bill of Exchange. 1.

—— *Smith* v. *Davies* (28 Ch. D. 650) questioned
See Practice. 10. [827

—— *Speller* v. *Bristol Steam Navigation Company* (13 Q. B. D. 96) distinguished - 344
See Practice. 20.

—— *Taylor* v. *Taylor* (Law Rep. 20 Eq. 155) dissented from - - - - 250
See Advancement.

—— *Tulk* v. *Moxhay* (2 Ph. 774) considered 750
See Covenant.

—— *Wigfield* v. *Potter* (45 L. T. (N.S.) 612) approved - - - - - 1
See Company. 7.

—— *Wildes* v. *Davies* (1 Sm. & Giff. 475; 22 L. J. (Ch.) 497) explained - - 893
See Will. 3.

—— *Wilson, In re* (28 Ch. D. 457) considered 913
See Practice. 3.

—— *Witt* v. *Corcoran* (2 Ch. D. 69) followed 60
See Practice. 4.

CATTLE STATION — Nuisance — Powers of railway company - - - 89
See Railway Company. 1.

CERTIFICATE—Patent suit - - 366
See Patent. 3.

CHAIRMAN—Meeting of shareholders - 159
See Company. 6.

CHAMBERS—Order in—Foreclosure—Alteration of order - - - - 827
See Practice. 10.

CHANGE OF PARTIES - - 190, 584
See Practice. 1, 2.

CHARGE—Property of company—Debenture
See Company. 3. [736

CHARITY—*Charitable Legacy—Lapse—Cy-près.*] A legacy to an ophthalmic hospital which had ceased to exist at the date of the testator's will *held* to have lapsed and not to be administered *cy-près*. *In re* Ovey. Broadbent *v.* Barrow **560**

2. —— *Mortmain—Bequest to Charity—Interest in Land—Mortgage of Interest of Cestui que trust in Funds invested partly on Mortgage of Real Estate—Apportionment—9 Geo. 2, c. 36, s. 3.*] A testator was entitled to £800, secured by mortgage of the life interest of a widow lady in the funds held on the trusts of her marriage settlement, and the reversionary interest of one of her children in the same funds. At the date of the mortgage and of the testator's death, part of these funds was pure personalty, and the rest was invested under a power in the settlement on mortgage of real estate. The testator bequeathed to charities such part of his residuary estate as could be so bequeathed:—*Held*, that the £800 was an interest in land within the meaning of 9 Geo. 2, c. 36, s. 3, and could not be given by will to a charity, and that there could not be any apportionment so as to make a part of the sum available for charity.—*Brook* v. *Badley* (Law Rep. 3 Ch. 672) approved and followed.—Observations of Jessel, M.R., in *In re Harris* (15 Ch. D. 561) explained. *In re* Watts. Cornford *v.* Elliott [947

CHEMICAL PROCESS - - - **366**
See Patent. 3.

CHILD—Advancement by portion—Distribution
See Advancement. [250

COMPANY—*Bonus Dividend—Capital or Income—Tenant for Life and Remainderman.*] A testator died in 1876 having bequeathed his residuary personal estate to his executor T. B. in trust for the testator's wife for life, and after her death to T. B. Part of the residuary estate consisted of 600 shares in a company whose directors had power, before recommending a dividend, to set apart out of the profits such sum as they thought proper as a reserved fund, for meeting contingencies, equalizing dividends, or repairing or maintaining the works. The shares were £10 shares on which £7 10*s.* per share had been paid up. In 1880 the reserved fund was £100,000, which had been made up in the testator's lifetime, and there was also an "undivided profit" fund of £36,070, more than half of which arose from profits earned in his lifetime. In September, 1880, the directors proposed to add to the "undivided profit" fund £7246, and recommended that the £100,000, and £38,000 out of the undivided profit fund, should be distributed as a "bonus dividend" of £2 10*s.* per share, and that there should be created new £10 shares amounting in number to one-third of the original shares, so that one new share might be allotted to each shareholder for every three original shares which he held, £7 10*s.* per share to be paid on allotment, which £7 10*s.* the bonus would enable him to pay. At a general meeting these recommendations were adopted, and special resolutions were passed, authorizing the directors, with the sanction of a general meeting, to declare a bonus out of the reserved and undivided profit fund, and providing for the issue and allotment of new shares. These resolutions were confirmed at a subsequent meeting, at which an ordinary resolution was passed for paying the bonus of £2 10*s.* per share. The warrant for the bonus had at its foot a memorandum to be signed by the shareholder directing the registrar of the company to apply the bonus in payment of the call. T. B. accepted the 200 new shares allotted to him, and signed the memorandum, and the new shares were registered in his name. After the death of the testator's wife in 1883, the question was raised whether the bonus of 1880 and the new shares belonged to the widow as tenant for life, or to T. B. as entitled to the capital of the testator's estate at her death:—*Held*, by Kay, J., that they were capital and belonged to T. B.—*Held*, on appeal, that there is no rule that where a sum, whether called bonus or dividend, is distributed by a company among its shareholders, it must, if it is paid out of the accumulated profits of past years, be treated between tenant for life and remainderman as capital. In most, if not all, cases, the inquiry when the profits out of which it is paid were earned is immaterial, the question being whether the company, having the power of distributing its profits as dividend, or of converting them into capital, has taken the former or the latter course.—*Held*, that in the present case the company had not, by setting aside profits to a reserved fund applicable for purposes several of which were not such as ought to be satisfied out of capital, or to an undivided profits fund, made them capital,—that the distribution of the bonus was not conditional on the shareholders accepting the new shares, and that it was not converted into capital by the offer of the new shares, the shareholders not being bound to apply it in taking them, that it must therefore be treated as income belonging to the tenant for life, and that the new shares acquired by means of it belonged to her estate. *In re* Bouch. Sproule *v.* Bouch - - **C. A. 635**

2. —— *Contract to take Shares—Contributory—Cancellation of Shares—Rescission of Contract—Companies Act*, 1862, *s.* 23.] W. T. & P. applied for shares in a limited company established for the purpose of purchasing and working a concession from a foreign Government. T. & P. were directors of the company. The directors sent letters of allotment to the applicants, in which they called on them to pay the allotment money by a certain day. But their names were never entered on the register, nor was any allotment money paid nor certificates of shares issued. Three years afterwards the directors made a fresh arrangement with the owners of the concession under which they purported to cancel the old allotments and to allot all the shares, except a few reserved for the directors and other persons, to the vendor of the concession and his nominees. The shares were accordingly entered in the register in their names. Soon afterwards the company was ordered to be wound up, and the liquidator applied to the Court to rectify the register by placing on it the names of W. T. & P. for the number of shares allotted to them, and to diminish the number of shares for which the vendor of the concession was entered on the register to a like amount;—*Held* (affirming the decision of Chitty, J.), that whether the effect of the application and allotment

COMPANY—*continued.*

was that W. T. & P. became actual members of the company in respect of the shares allotted to them or only agreed to become such members, it was now too late, under the circumstances which had occurred, for the company to insist on placing their names on the register.—But *semble*, according to the true construction of the 23rd section of the Companies Act, 1862, they did not become members in respect of the allotted shares, the entry on the register being a condition precedent to such membership.—*Held*, also, that the fact that T. & P. were directors whose duty it was to place the allottees on the register did not affect the question. *In re* Florence Land and Public Works Company. Nicol's Case. Tufnell & Ponsonby's Case. - - - - 421

3. —— *Debentures—Charge on all Property present and future—Floating Security—Power of Company to deal with Property.*] A company which carried on the business of ironmasters and manufacturers, issued debentures for a total sum of £500,000, by which they charged their undertaking, works, stock-in-trade, plant, moneys, and other real and personal property, both present and future, with the payment of the sums secured by the debentures "to the intent that the same charge shall, until default in the payment of the principal or interest to accrue due or become payable in respect of the said sum of £500,000, or some part thereof, be a floating security upon the undertaking, works, and property of the company, not hindering sales or leases of, or other dealings with, any of the property or assets of the company in the course of its business as a going concern." The company afterwards contracted to sell some of their land:—*Held*, that the purchaser was entitled to reasonable evidence that there had been no default in the payment of the principal or interest of the debentures.—*In re Florence Land and Public Works Company* (10 Ch. D. 530) and *In re Colonial Trusts Corporation* (15 Ch. D. 465) distinguished. *In re* Horne and Hellard - 736

4. —— *Debentures — Mortgage — Priority.*] The directors of a company with power to borrow or create mortgages or issue debentures, issued debentures purporting to charge the undertaking and the hereditaments and effects of the company with the payment of the sums mentioned in the debentures respectively, to the intent that the debentures might rank equally as a first charge on the undertaking, hereditaments and effects of the company. They afterwards, in consideration of £4000 advanced and applied to the purposes of the company, deposited with the Plaintiff the title-deeds of the colliery the property of the company, and by a written agreement charged the property comprised in the deeds with the payment to the Plaintiff of £4000 and interest:—*Held*, that the mortgage to the Plaintiff had priority over the debentures. Wheatley *v.* Silkstone and Haigh Moor Coal Company - - - 715

5. —— *False Representation—Issue of Debentures—Misstatement of Object of Loan—Contributory Mistake of Plaintiff.*] A misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it.—Where a plaintiff has been induced both by his own mistake and by a material misstatement by the defendant to do an act by which he receives injury, the defendant may be made liable in an action for deceit.—The directors of a company issued a prospectus inviting subscriptions for debentures, and stating that the objects of the issue of debentures were to complete alterations in the buildings of the company, to purchase horses and vans, and to develop the trade of the company. The real object of the loan was to enable the directors to pay off pressing liabilities. The Plaintiff advanced money on some of the debentures under the erroneous belief that the prospectus offered a charge upon the property of the company, and stated in his evidence that he would not have advanced his money but for such belief, but that he also relied upon the statements contained in the prospectus. The company became insolvent:—*Held* (affirming the decree of Denman, J.), that the misstatement of the objects for which the debentures were issued was a material misstatement of fact, influencing the conduct of the Plaintiff, and rendered the directors liable to an action for deceit, although the Plaintiff was also influenced by his own mistake. Edgington *v.* Fitzmaurice - - - C. A. 459

6. —— *General Meeting—Poll—Mode of taking Poll — Chairman, Direction of — Companies Act, 1862, Table A, Art.* 43.] The articles of association of a company provided (in the terms of Art. 43 of Table A to the Companies Act, 1862) that if at any general meeting of the company a poll should be demanded it should be taken "in such manner as the chairman shall direct."—A poll having been demanded at a meeting summoned to consider a resolution for a voluntary winding-up, the chairman directed the poll be taken then and there. It was so taken, and the resolution was carried:—*Held*, that the poll had been rightly taken.—*Reg.* v. *D'Oyly* (12 Ad. & E. 139) followed.—Observations on the dicta of Jessel, M.R., and Brett, L.J., in *In re Horbury Bridge Coal, Iron, and Waggon Company* (11 Ch. D. 109, 114). *In re* Chillington Iron Company - - 159

7. —— *Reduction of Capital—Companies Act, 1867 (30 & 31 Vict. c. 131)—Companies Act, 1877 (40 & 41 Vict. c. 26)—General Orders, March, 1868, r. 5—Advertisement of Presentation of Petition.*] A limited company whose shares were all fully paid up, having lost part of its capital, presented a petition to reduce the nominal capital by the amount of the loss, reducing the nominal amount of each share from £1 to 12*s.* 6*d.* Bacon, V.-C., refused to hear the petition until its presentation had been advertised as prescribed by the 5th rule of the General Order of 1868, made under the Companies Act, 1867:—*Held*, on appeal, that a petition for reduction of capital authorized by the Companies Act, 1877, ought primâ facie to be advertised as directed by the General Order of 1868, though the Judge has a discretion to dispense with advertisements if he is satisfied that the interests of creditors cannot be affected by what is proposed, and that as in the present case the Judge in his discretion thought that the petition ought to be advertised, the Court of Appeal would not interfere. *In re* Tambracherry Estates Company [C. A. 683

COMPANY—*continued.*

8. —— *Reduction of Capital—Time—Computation of—Interval—Company—Special Resolution—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.] The interval of not less than fourteen days which under sect. 51 of the Companies Act, 1862, is to elapse between the meetings passing and confirming a special resolution of a company is an interval of fourteen clear days, exclusive of the respective days of meeting, and therefore a special resolution for reduction of capital passed at a meeting held on the 25th of February, 1885, and confirmed at a meeting held on the 11th of March, 1885, was held to be bad. *In re* RAILWAY SLEEPERS SUPPLY COMPANY - - - - - - 204

9. —— *Unregistered Company—Freehold Land Society—Association of more than Twenty Persons—Business for the Acquisition of Gain—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 4.] In 1873 an association of more than twenty persons was formed for the object, as stated in its deed of settlement, of purchasing a freehold estate and reselling it in allotments to the members of the association. The deed was executed by all the members, the name of each, the number of his allotment, the total amount he was to pay, and the amount of his monthly payment to be made in respect of it, being specified in a schedule to the deed. The property was vested in trustees, and its management was vested in a president, vice-president, treasurer, secretary, and a committee. The deed contained provisions for the conveyance to the members of their allotments when they had paid up the whole amount payable in respect of them, and for forfeiture and sale of the allotments of defaulting members. Powers were given to the committee to make roads, drains, &c., on the land, and powers were given to the trustees of borrowing money on mortgage with the consent of a general meeting. When all mortgages had been paid off and all the allotments had been conveyed the society was to come to an end. The society was not registered under the Companies Act, 1862:—*Held*, that the society was not an association formed for the purpose of carrying on any business that had for its object the acquisition of gain, and was not made illegal by the Companies Act, 1862, s. 4.—*Crowther* v. *Thorley* (32 W. R. 330) followed.—*Wigfield* v. *Potter* (45 L. T. (N.S.) 612) approved. *In re* SIDDALL - - - - - - C. A. 1

10. —— *Winding-up—Jurisdiction—Foreign Company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89, *s.* 199).] There is no jurisdiction under the Companies Act, 1862, to wind up a foreign company which has carried on business in England by means of agents, but which has no branch office of its own there. *In re* LLOYD GENERALE ITALIANO - - - - - 219

—— Director—Misfeasance - - - 795
See PRINCIPAL AND AGENT.

—— Winding-up—Balance order—Retainer 934
See EXECUTOR. 2.

COMPOSITION WITH CREDITORS—Forfeiture on insolvency - - - 196
See SETTLEMENT. 2.

COMPUTATION OF TIME—Notice of meeting of company - - - - - 204
See COMPANY. 8.

CONDITIONS OF SALE - - - 626
See VENDOR AND PURCHASER. 1.

CONTRACT—Rescission - - 626, 661
See VENDOR AND PURCHASER. 1, 5.

—— To take shares - - - - 421
See COMPANY. 2.

CONTRIBUTORY—Contract to take shares 421
See COMPANY. 2.

—— Executor of shareholder—Retainer - 934
See EXECUTOR. 2.

CONTRIBUTORY MISTAKE - - 459
See COMPANY. 5.

CONVEYANCE—Bare trustee—Vendor and Purchaser Act - - - - 693
See VENDOR AND PURCHASER. 2.

COSTS—Administration proceedings - 913
See PRACTICE. 3.

—— Appeal—Note of judgment of Court below
See PRACTICE. 6. [76

—— Appeal for - - - - 60, 85, 495
See PRACTICE. 4, 5, 7.

—— Patent action - - - 325, 366
See PATENT. 1, 3.

—— Trustee—Administration action - 495
See PRACTICE. 5.

—— Trustee—Administration action - 348
See TRUSTEE. 1.

COVENANT—*Running with Land—Covenant to repair—Assigns—Personal Covenant—Notice, Equitable Doctrine of.*] The doctrine in *Tulk* v. *Moxhay* (2 Ph. 774) is limited to restrictive stipulations, and will not be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs or otherwise which does not run with the land at law.—*Semble*, that the burden of a covenant (not involving a grant) never runs with the land at law, except as between landlord and tenant.—*Cooke* v. *Chilcott* (3 Ch. D. 694) overruled on this point.—*Morland* v. *Cook* (Law Rep. 6 Eq. 252) explained.—*Holmes* v. *Buckley* (1 Eq. C. Ab. 27) discussed. Consideration of the circumstances under which a covenant will be held to touch or concern the land of the covenantee so that the benefit may run with the land.—A., by deed, conveyed for value to trustees in fee a piece of land as part of the site of a road intended to be made and maintained by the trustees under the provisions of a contemporaneous trust deed (being a deed of settlement for the benefit of a joint stock company established to raise the necessary capital for making the road); and in the conveyance the trustees covenanted with A., his heirs and assigns, that they, the trustees, their heirs and assigns, would make the road and at all times keep it in repair, and allow the use of it by the public subject to tolls. The piece of land so conveyed was bounded on both sides by other lands belonging to A. The trustees duly made the road, which afforded the necessary access to A.'s adjoining lands. A. afterwards sold his adjoining lands to the Plaintiff, and the trustees sold the road to the Defendants, both parties taking with notice of the covenant to repair:—*Held* (affirming the decision of the Vice-

COVENANT—*continued.*
Chancellor of the Duchy of Lancaster), that the Plaintiff could not enforce the covenant against the Defendants. Austerberry *v.* Corporation of Oldham - - - - C. A. 750
—— Lease—Disclaimer by trustee in liquidation *See* Bankruptcy. 2. [8
—— To pay money free from all deductions 697 *See* Settlement. 1.

CREDITORS' DEED—*Time for executing.*] Incumbrancers who had claimed priority over a creditors' deed and failed in their contention were not allowed afterwards to execute and take the benefit of the deed. *In re* Meredith. Meredith *v.* Facey - - - - - 745

CROSS ACTIONS—Res judicata - - 448 *See* Estoppel. 2.

CROSS-EXAMINATION—Affidavit—Expenses of witness - - - - 711 *See* Practice. 8.

CY-PRÈS—Charity which has ceased to exist 560 *See* Charity. 1.

DEBENTURES—Misstatement of object of loan —Action of deceit - - - 459 *See* Company. 5.
—— Priority - - - - 715, 736 *See* Company. 3, 4.

DECLARATION—Deceased father—Evidence of birth - - - - - 985 *See* Evidence.

DEDICATION TO PUBLIC - - - 750 *See* Highway.

DEFAULT—Judgment by—Appeal - 322 *See* Practice. 11.

DEFENDANT—Cross-examination—Expenses *See* Practice. 8. [711

DEPOSIT OF DEEDS—Priority—Negligence 725 *See* Mortgage. 3.

DEVASTAVIT—Debt barred by Statute of Frauds *See* Executor. 1. [358

DIRECTOR—Misfeasance - - - 795 *See* Principal and Agent.

DISCLAIMER—Trustee in liquidation - 8 *See* Bankruptcy. 2.

DISCOVERY—Interrogatories - - 29 *See* Practice. 9.
—— Production of documents - 307, 899 *See* Practice. 15, 16.

DISCRETION—Trustees—Power of investment *See* Trustee. 2. [889

DISENTAILING DEED—Mistake—Rectification *See* Tenant in Tail. [133

DISMISSAL FOR WANT OF PROSECUTION—Costs—Discretion of Judge - 85 *See* Practice. 7.

DISSOLUTION—Partnership - - 170 *See* Partnership.

DISTRESS—Payment of rent by surety - 254 *See* Landlord and Tenant.

DISTRIBUTION—Statute of—Advancement 250 *See* Advancement.

DIVIDEND—Bonus—Capital or income - 635 *See* Company. 1.

DOMICIL—*Abandonment of Domicil of Choice—Probate—Construction of Will expressed in Terms of Foreign Law.*] A Scotchman came to live in England and acquired an English domicil. He afterwards went for two years to France and returned to England, where he soon after died. He left an unsigned will of personal estate, made in 1827, which was drawn by a Scotch lawyer, and contained several technical words of Scotch law. The will was admitted to probate by the English Court. It was held by Pearson, J.:—(1), that the grant of the probate was not conclusive that the testator was domiciled in England; (2), that the Scotch domicil of the testator had revived, and that he died a domiciled Scotchman; (3), that the will must be construed according to Scotch law; and (4), that upon the true construction of the will the Plaintiff was entitled to the estate:—*Held*, by the Court of Appeal, that whether the testator was domiciled in Scotland or England, and whether the will was to be construed according to English or Scotch law, on the true construction of the will the Plaintiff was entitled to the estate; and therefore the question of domicil was immaterial.—But, *semble*, the testator died domiciled in England, his residence in France not being sufficient evidence of his intention to abandon his English domicil.—*Semble*, also, the use of some technical Scotch terms in his will did not furnish sufficient indication of the intention of the testator to induce the Court to construe it according to Scotch law. Bradford *v.* Young [C. A. 617

2. —— *Unsettled Residence—Territorial Limits of England—Domicil of Origin.*] P. was born in Scotland, in 1792, of Scotch parents. In 1810 he obtained a commission in the army, and immediately proceeded with his regiment on foreign service, and served abroad till 1860, when he retired from the army. From 1860 till his death he resided in lodgings, hotels, and boarding-houses in various places in England, dying in 1882, intestate and a bachelor, in a private hotel in London, leaving no real estate in England, and no property whatsoever in Scotland. From the year 1810 till his death he never revisited Scotland, and for the last twenty-two years of his life never left the territorial limits of England:—*Held*, that the domicil of the intestate at his death was Scotch. *In re* Patience. Patience *v.* Main 976
—— Probate of will—Estoppel - - 268 *See* Estoppel. 1.

EASEMENT—Light - - - - 155 *See* Light.

EMBARRASSING PLEADING - - 344 *See* Practice. 20.

ESTOPPEL—*Res Judicata—Judgment in rem—Finding on Issues on which Judgment in rem is founded.*] A native of Chili made his will in London, in November, 1859, and died in February, 1860. A caveat having been entered on behalf of the testator's daughter, the will was propounded by the executors in solemn form, the executors alleging that the testator was domiciled in England. The daughter alleged that the

ESTOPPEL—*continued.*

testator was domiciled in Chili, and that his will was not executed according to Chilian law. In July, 1860, the Judge of the Probate Court made a decree by which he pronounced for the validity of the will, found that the testator was domiciled in England, and decreed probate to the executors. In September, 1860, the executors filed a bill against the residuary legatee and a pecuniary legatee for administration of the estate, in which a decree was made in November, 1860. In 1862, the daughter filed a bill against the executors, alleging that the testator was a domiciled Chilian, that his will being executed in England, according to English law, was good by the law of Chili, but so far only as the testator could by the law of Chili dispose of his property by will; that according to that law he could only dispose by will of one-fourth of his personal estate, and that the other three-fourths belonged to the Plaintiff. The executors by answer set up the decree of the Probate Court as a bar, and no further steps were taken in the suit. In 1877, an order was made staying proceedings in the latter suit, and in another suit, but giving liberty to any of the parties to apply to add to the decree in the former cause all accounts and inquiries necessary to determine all questions in the suits so stayed. Pursuant to this leave, the daughter and her husband applied to add to the decree inquiries as to the legitimacy of the daughter and the domicil of the testator, and as to what part of his personal estate he could according to Chilian law dispose of by will, and an order was made in 1878 directing inquiries as to the legitimacy, the rest of the application to stand over. In 1881 and 1882 orders were made transferring the conduct of the cause from the Plaintiff, the surviving executor, to the residuary legatee, dispensing with service of any notices or proceedings on the Plaintiff, and appointing the residuary legatee to represent the estate of the testator in the cause. In 1884 the application for an inquiry as to domicil was renewed against the residuary legatee, but without notice to the Plaintiff, and Bacon, V.C., made an order directing the inquiry as asked. The residuary legatee appealed:—*Held*, that the decree of the Probate Court was not conclusive in rem as to the domicil, for that it did not appear that the decree was necessarily based on the finding as to domicil. And quære, whether the findings on which a judgment in rem is based are in all cases conclusive against the world.—*Held*, further, that the finding by the Probate Court as to domicil was not binding inter partes as between the daughter and the residuary legatee, for that it was a finding between the daughter and the executors, that the executors could not by litigating in that suit a question of domicil, which it was not necessary to decide for the purposes of the suit, conclude the residuary legatee as to the extent of the testator's power of disposing of his property, and did not represent him for that purpose, and that as the residuary legatee was not bound, the daughter could not be bound, since estoppel must be mutual.—*Held*, therefore, that the inquiry was properly directed, and this notwithstanding that the application had not been served on the executor. An application by counsel for the

ESTOPPEL—*continued.*

executor for leave to be heard on the appeal was refused. DE MORA *v.* CONCHA - **C. A. 268**

2. —— *Res Judicata—Cross Actions in English and Irish Courts—Pleading—Evidence of Proceedings in Irish Action—Report of Judge.*] *Held*, by Pearson, J., that in order to raise the defence of res judicata it is not necessary to set forth in detail in the defence the pleadings in the other action the judgment in which is said to operate as res judicata, but, in order to judge whether the same questions were at issue in the first action as in the second, the Court will look at the pleadings in the first action, though they were not set forth in the defence in the second action. Whether a judgment obtained in one action before the trial of another can operate by way of estoppel as res judicata, unless the judgment was obtained before the issue of the writ in the second action, *Quære.*—On appeal by the Defendant an order was taken by arrangement.—*Held*, by the Court of Appeal, that a report made by an Irish Judge to a Divisional Court in Ireland to be used on an application to set aside the verdict, was evidence in an English action between the same parties of what took place at the trial and what the Judge decided.—An affidavit verifying the shorthand note of the judgment in the action pleaded as res judicata was also admitted. HOUSTOUN *v.* MARQUIS OF SLIGO **C. A. 448**

EVIDENCE—*Baptismal Register—Entry of Date of Birth—Declarations of deceased Father.*] Although an entry in a baptismal register by the officiating clergyman of the day when the baptized child was born furnishes no proof per se that the child was born on the day stated, the entry will not be rejected altogether as an item of evidence upon an inquiry as to the legitimacy, from its birth before or after the marriage of its reputed parents, of the child in question.—Declarations by a reputed father contained in business letters written by one of his daughters in his name and under his dictation admitted as evidence after his death of the date of their birth upon the question of their legitimacy. *In re* TURNER. GLENISTER *v.* HARDING - - - - - **985**

—— Entry against interest - - **882**
See LIMITATIONS, STATUTE OF. 2.

—— Proceedings in Irish action — Shorthand notes - - - - - **448**
See ESTOPPEL. 2.

EXECUTION OF CREDITORS' DEED - 745
See CREDITORS' DEED.

EXECUTOR—*Administration — Devastavit — Retainer—Statute of Frauds.*] An executor or administrator would commit a devastavit who paid a debt to a creditor who is prevented from enforcing it by the Statute of Frauds. And for the same reason an executor or administrator cannot retain such debt if due to himself. A father in consideration of the marriage of his daughter made a verbal promise to pay his daughter and her husband £500. He died intestate without performing his promise, and the daughter took out administration to his estate:—*Held* (affirming the decision of KAY, J.), that the administratrix could not retain the debt out of the assets. *In re* ROWNSON. FIELD *v.* WHITE - - - **C. A. 358**

EXECUTOR—*continued.*

2. —— *Retainer — Company — Liquidator— Contributory—Balance Order—Administration— Priority—Companies Act*, 1862, *ss.* 75, 76, 103, 105, 106—*Gen. Ord. Nov.* 1862, *r.* 35; *Sched. III., Form* 39.] Where under sects. 76 and 103 of the Companies Act, 1862, and Rule 35 of Gen. Ord. Nov. 1862, a balance order has been obtained by the official liquidator of a company against the legal personal representative of a deceased contributory for payment of a call made after the death, the order being in accordance with Form 39 in Sched. III. to the Gen. Ord., and directing the legal personal representative to pay the call "out of the assets of the deceased in his hands as such legal personal representative to be administered in due course of administration," such an order is not in the nature of a judgment so as to constitute the liquidator a judgment creditor; it is to be treated simply as analogous to a common administration judgment, or as a step to the administration judgment which may be obtained by the liquidator under sect. 105 of the Companies Act, 1862, and which is his proper remedy in case the legal personal representative has failed to comply with the order; and therefore the order, whether followed by an administration judgment or not, leaves untouched all priorities and rights usually existing in the due course of the administration of the estate of a deceased person, including an executor's right of retainer. Thus, the order, if obtained against executors, does not give the liquidator priority over a debt due to one of them from the testator, and therefore retained by that executor out of the assets, even though the order be prior in date to notice of the retainer.—One of several executors is entitled to a right of retainer in respect of a mortgage debt due from the testator to a body of trustees of whom that executor is one.—Decision of Bacon, V.C., reversed. *In re* Hubback. International Marine Hydropathic Company *v.* Hawes - - **C. A.** 934

—— Legacy to - - - - 893
See Will. 3.

EXONERATION—Lapsed bequest - - 145
See Will. 2.

EXPERIMENT—User for—Infringement of patent - - - - - 164
See Patent. 2.

FALSE REPRESENTATION—Prospectus of company—Issue of debentures - 459
See Company. 5.

FANCY WORD - - - - 877
See Trade-mark. 1.

FATHER—Advancement to child—Distribution
See Advancement. [250

FORECLOSURE—Order on summons in Chambers—Alteration - - - 827
See Practice. 10.

FOREIGN COMPANY—Jurisdiction to wind-up
See Company. 10. [219

FOREIGN LAW—Construction of will - 617
See Domicil. 1.

FORFEITURE ON INSOLVENCY—Composition
See Settlement. 2. [196

FRAUD—Complicity in—Notice of prior fraud
See Power of Attorney. [500

FRAUDS, STATUTE OF—Debt barred by—Retainer by executor - - - 358
See Executor. 1.

FUND IN COURT—Stop order—Notice - 786
See Mortgage. 2.

GENERAL ORDER, NOVEMBER 1862, r. 35, Schedule III., Form 39. [934
See Executor. 2.

GENERAL ORDERS, MARCH 1868, r. 5 - 683
See Company. 7.

HIGHWAY—*Turnpike Road—Private Owners—Tolls—Dedication to Public Street — "Highway repairable by Inhabitants at large"*—38 & 39 *Vict. c.* 55, *ss.* 4, 150.] The promoters of an intended road by deed declared that the road should not only be enjoyed by them for their individual purposes, but "should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road," but subject to the payment of tolls by the persons using it:—*Held*, that this was not a dedication of the road to the public, and that the road was not a highway repairable by the inhabitants at large under sect. 150 of the Public Health Act, 1875.—*Semble*, an individual cannot, without legislative authority, dedicate a road to the public if he reserves the right to charge tolls for the user; and the mere fact that a number of persons form themselves into a company for making and maintaining a road, and erect gates and bars and charge tolls, does not make the road a "turnpike road" in the sense of a turnpike road made such by Act of Parliament, and so dedicated to the public. Austerberry *v.* Corporation of Oldham **C. A.** 750

HUSBAND AND WIFE—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 5—*Devise of Real Estate for Life and in Remainder—Marriage of Female Reversioner in* 1878—*Death of Tenant for Life in* 1884—*Separate Estate.*] Testator, who died in 1875, devised his real estate to his wife for life, with remainder to his children. One daughter married in 1878, and the tenant for life died in 1884:—*Held*, following the decision in *Baynton* v. *Collins* (27 Ch. D. 604), that under the operation of sect. 5 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the married woman's share in the estate was her separate property, and could be disposed of by her without the concurrence of her husband. *In re* Thompson and Curzon - - - - - 177

2. —— *Wife's Real Estate—Sale by Wife—Non-concurrence of Husband—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 91—*Husband's Interest in Rents and Profits—Judicature Act*, 1873, *s.* 25, *sub-s.* 11—*Wife's Equity to a Settlement.*] An order in the usual form obtained under s. 91 of the Fines and Recoveries Act, 1833, by a married woman, empowering her to dispose of her real estate without the concurrence of her husband, does not deprive him of the common law rights which he acquired in the property by reason of the coverture.—Where, therefore, under such an order, a married woman sold and conveyed all her estate and interest in real

HUSBAND AND WIFE—*continued.*
estate, her husband refusing to join:—*Held*, that the husband's common law right to the rents during the coverture remained unaffected by the wife's alienation, but that (she asserting her equity to a settlement) he was bound, whether his estate was legal or equitable, to provide for her out of the rents; and, under the circumstances, the whole of the rents were settled upon her. FOWKE *v.* DRAYCOTT - - - - 996
—— Conveyance—Vendor and Purchaser Act *See* VENDOR AND PURCHASER. 2. [693
—— Mortgage by—Inquiry as to settlement 221 *See* MORTGAGE. 4.
—— Production of documents - - 899 *See* PRACTICE. 15.

ILLEGALITY—Unregistered association of more than twenty persons - - 1 *See* COMPANY. 9.
IMPROVEMENTS—Lunatic's estate—Charge 306 *See* LUNATIC.
INCUMBRANCES—Payment of—Settled Land Act - - - - - 588 *See* SETTLED LAND ACT. 1.
INDEMNITY—Assignment of lease - 254 *See* LANDLORD AND TENANT.
—— Claim for - - - - - 344 *See* PRACTICE. 20.

INFANT—*Maintenance—Contingent Legacy to Infant—Intermediate Income—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41). *s.* 43.] Sect. 43 of the Conveyancing and Law of Property Act, 1881, empowering trustees to apply towards the maintenance of an infant the income of property held in trust for him contingently on his attaining the age of twenty-one years, does not authorize the allowance of maintenance where, apart from the Act, the infant on attaining twenty-one would only be entitled to the legacy without interest.—Decision of Kay, J., affirmed. *In re* DICKSON. HILL *v.* GRANT [C. A. 331

2. —— *Maintenance—Jurisdiction—Discretion of Trustees.*] A female infant was entitled contingently on her attaining twenty-one, or marrying, to a fund of which her deceased mother had been tenant for life. The trustees had power "to apply all or any part" of the income (about £538 a year) for her maintenance and education. On a summons in the matter of the infant, Bacon, V.-C., held that he had jurisdiction to control the discretion of the trustees as to the quantum to be allowed, and made an order on them to pay £400 a year to the father for her maintenance and education. The trustees appealed, and in answer to an inquiry by the Court stated their intention to allow £250 to the father for her maintenance and education:—*Held*, that the order of the Vice-Chancellor was irregular, and must be discharged, the Court having no jurisdiction on a summons in the matter of an infant to make any order for payment by trustees or other persons.—Whether the Court could control the discretion of the trustees as to the amount to be allowed for maintenance and education, so long as such discretion was honestly exercised, *quære*. *In re* LOFTHOUSE, AN INFANT C. A. 921

INFANT—*continued.*
3. —— *Surrender of Lease*—11 *Geo.* 4 & 1 *Will.* 4, *c.* 65, *ss.* 12, 14.] The provisions of the Act 11 Geo. 4 & 1 Will. 4, c. 65, for the surrender of a lease to which an infant is entitled, apply to a lease to which an infant is only beneficially entitled, the legal estate being vested in a trustee for him. *In re* GRIFFITHS, AN INFANT [248
—— Right to administration judgment - 913 *See* PRACTICE. 3.
INJUNCTION—Judgment creditor—Administration action - - - - 557 *See* JUDGMENT. 1.
INTEREST—Payment of—Statute of Limitations - - - - 882 *See* LIMITATIONS, STATUTE OF. 2.
—— Purchase-money—Payment by mistake 691 *See* VENDOR AND PURCHASER. 4.
INTERMEDIATE INCOME—Infant—Contingent legacy - - - - 331 *See* INFANT. 1.
INTERROGATORIES - - - - - 29 *See* PRACTICE. 9.
INTESTATE—Administration—Statute of Limitations - - - - 964 *See* LIMITATIONS, STATUTE OF. 1.
INVESTMENT—Power of—Trustees - 889 *See* TRUSTEE. 2.
ISOMERIC SUBSTANCES - - - 366 *See* PATENT. 3.

JUDGMENT—*Administration—County Court—Injunction.*] Previously to the administration order in a creditor's action another creditor had obtained judgment in a county court against the Defendant, a sole executrix. The Court refused to restrain the creditor from pursuing his remedy in the County Court against the executrix personally, but ordered payment to the creditor by the receiver of the estate, without prejudice to the question whether the executrix should be allowed the payment. *In re* WOMERSLEY. ETHERIDGE *v.* WOMERSLEY - - - 557

2. —— *Registration—Omission to re-register within Five Years—Priorities*—1 & 2 *Vict. c.* 110, *s.* 19—2 & 3 *Vict. c.* 11, *s.* 4—3 & 4 *Vict. c.* 82, *s.* 2.] A., B., and C. were judgment creditors of D. A. registered his judgment on the 12th of March, 1840, but never re-registered; B. registered his judgment in April, 1842, and re-registered in March, 1848; C. registered his judgment on the 18th of March, 1845, and re-registered on the 16th of March, 1850. Questions having arisen as to the priorities of the several judgment creditors, the fund in Court being insufficient for payment in full:—*Held*, that on the construction of the statutes 1 & 2 Vict. c. 110, s. 19, 2 & 3 Vict. c. 11, s. 4, and 3 & 4 Vict. c. 82, s. 2, and upon the principle laid down in *Beavan* v. *Earl of Oxford* (6 D. M. & G. 492), C. was first entitled to take out of the fund the sum found due on A.'s judgment, and then that B. was entitled to be paid the full amount of his judgment before C. took anything more in respect of his judgment. *In re* LORD KENSINGTON. BACON *v.* FORD 527

JUDGMENT—*continued.*

—— By default—Appeal - - - 322
See Practice. 11.

—— Estoppel - - - - 268, 448
See Estoppel. 1, 2.

—— Note of—Costs of appeal - - 76
See Practice. 6.

JURISDICTION — Winding-up — Foreign company - - - - 219
See Company. 10.

LAND—Interest in—Mortmain - - 947
See Charity. 2.

LAND DRAINAGE—Charges on land - 588
See Settled Land Act. 1.

LAND SOCIETY—Illegality—Unregistered company - - - - - 1
See Company. 9.

LANDLORD AND TENANT — *Assignment of Lease—Right of Assignor to Indemnity—Dilapidations—Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 5.] On the dissolution of a partnership between H. and R., H. assigns to R. all his interest in two houses belonging to the partnership held under sub-leases from C. and D., and R. covenanted to pay the rents and observe the covenants and keep H. indemnified against them. R.'s executors sold the houses to B., and B. to a company which went into liquidation. The landlords C. and D. thereupon sued H. for the rent, and he paid it for the whole of the year 1882. D. also made a large demand against H. for breaches of covenants to repair, but H. made no payment. On the 15th of March, 1883, D. assigned his reversion to H., and in May, 1883, H. acquired C.'s reversion. In June, 1883, H. bought the leasehold interest in both houses from the liquidators of the company, and covenanted thenceforth to pay the rent and observe the covenants. H. sought to prove against the estate of R. for the sums paid for rent, for the rent payable at Lady Day, 1883, on D.'s house, and for the amount of the dilapidations in that house:—*Held*, that the right of H., under R.'s covenant of indemnity, to prove for the rents which he had paid, was not taken away by his covenant in the assignment by the liquidators, which could not be extended to rents already due and paid:—*Held*, also that this right was not defeated on the ground that the right of R.'s representatives, if they paid rent, to recover it from the owner of the lease for the time being, was interfered with by the assignment from the liquidators to H., for that this assignment could not take away any right of action which R.'s executors might have against the persons entitled to the houses at the end of 1882, and that an assignor who pays rent has no lien on the terms, and so cannot be prejudiced by its subsequent assignment:—*Held*, further, that the right was not defeated on the ground that H. on paying the rent became entitled to a right of distress from the reversioners, which he had destroyed by taking an assignment of the leases, and had therefore discharged the estate of R. by releasing a remedy to the benefit of which R. as a surety was entitled, for that a right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5:—*Held*, therefore, that H. was entitled to prove against R.'s estate for the rent paid in 1882 on both houses:—*Held*, also, that he was entitled to prove for the Lady Day rent on D.'s house:—But *held*, that H. was not entitled to prove for the amount of dilapidations, for that he had sustained no damage by reason of them, inasmuch as he bought the leases from the liquidators at a less price in consequence of the breaches of the covenant to repair; nor for the Lady Day rent of C.'s house. *In re* Russell. Russell *v.* Shoolbred - - - C. A. 254

LANDS CLAUSES ACT — *Railway Company—Sale of Superfluous Land—Land previously subject to statutory Prohibition against building.*] An Inclosure Act passed in 1806 provided that no buildings should at any time thereafter be erected on a certain strip of land. In 1865 a railway company under their statutory powers acquired a portion of the strip of land for the purposes of their undertaking. A part of the land thus acquired became superfluous land, and the company in 1868 sold and conveyed the superfluous part to a purchaser who demised it to the Defendant. The Defendant in 1885 commenced building on the land:—*Held*, that the land acquired by the company was freed from the prohibition of building only for the purposes of the company's undertaking, and that, when part of it was sold as superfluous land, the prohibition of building revived in respect of that part.—An injunction to restrain the Defendant from building on the land in contravention of the provisions of the Inclosure Act was granted at the suit of an owner of adjoining land. Bird *v.* Eggleton - - 1012

—— Costs of re-investment—Solicitor's charges
See Solicitor. 6. [209

LAPSE—Direction that share shall fall into residue - - - - - 142
See Will. 4.

—— Mortmain—Exoneration from debts - 145
See Will. 2.

LEASE—Assignment—Right of indemnity 254
See Landlord and Tenant.

—— Disclaimer by trustee in liquidation - 8
See Bankruptcy. 2.

—— Enlargement to fee - - 1007, 1009, n.
See Leasehold. 1, 2.

—— License to assign - - - 661
See Vendor and Purchaser. 5.

—— Renewable - - - - 221, 673
See Renewable Lease. 1, 2.

—— Surrender of—Infant - - - 248
See Infant. 3.

LEASEHOLD — *Enlargement of Long Term into Fee—"Rent having no Money Value"—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 65.] Land was demised for a term of 500 years from Michaelmas, 1646, at the yearly rent of "one silver penny, if lawfully demanded":—*Held*, that this rent was a "rent having no money value," within the meaning of sect. 65 of the Conveyancing Act, 1881, and that the owner

LEASEHOLD—*continued.*
of the term in 1884 had power under that section to enlarge the term into a fee. *In re* CHAPMAN AND HOBBS - - - - - 1007
2. —— *Long Term—Enlargement into Fee—"Rent having a money value"*—44 & 45 *Vict. c.* 41, *s.* 65.] Land was demised for 1000 years from 1607 at a yearly rent of 3*s.* In 1882 the land was sold as freehold:—*Held*, that the rent of 3*s*, had a money value, and that the owner had now power to enlarge the term into a freehold under the 65th section of the Conveyancing Act, 1881. *In re* SMITH AND STOTT - 1009, n.

LEGACY DUTY—Covenant to pay money free from all deductions - - 697
See SETTLEMENT. 1.

LETTTER OF ADVICE—Bill of exchange 848
See BILL OF EXCHANGE. 2.

LIEN—Company—Debt of shareholder - 149
See MORTGAGE. 1.
—— Solicitor—Property recovered - - 517
See SOLICITOR. 2.
—— Sale of goods—Stoppage in transitu - 813
See BILL OF EXCHANGE. 1.

LIGHT — *Ancient Light — Rebuilding — Alteration in Position—Preservation of Ancient Light.*] In rebuilding a house, which had an ancient light in its ground floor front room, the front wall, which originally stood out beyond the general building line four feet at one end and seven feet at the other, was set back into the general building line; and in the new front wall was placed a window the position of which corresponded to a great extent with the position of the ancient light in the old front wall. The new room was about the same frontage breadth as the old, but included little more than half the site of it, viz. a depth of nine feet at one end, and less than four feet at the other:—*Held*, that the right to the ancient light had not been lost. BULLERS *v.* DICKINSON 155

LIMITATIONS, STATUTE OF—*Administration—Statutory Bar*—23 & 24 *Vict. c.* 38, *s.* 13—"*Dying Intestate*"—"*Present right to receive*"—*Part Payment.*] The operation of 23 & 24 Vict. c. 38, s. 13, is retrospective, so that the limitation of twenty years "next after a present right to receive the same shall have accrued" thereby imposed (in analogy to 3 & 4 Will. 4, c. 27, s. 40) upon claims to recover personal estate of "any person dying intestate, possessed by the legal personal representative of such intestate," is not confined to the case of persons dying intestate after the 31st of December, 1860, the time fixed by the section for commencement of the operation of the enactment. —Accordingly a claim by next of kin for general administration of the estate of an intestate who died in 1848 was barred at the end of twenty-one years from that date; and leave to revive an administration suit relating to the same estate in which no proceeding had been taken since the decree in 1855 was refused.—But with respect to assets of the intestate not received by the administrator until 1870 (more than twenty years after the death, and within twenty years before the issue of the writ) the claim of the next of kin to administration, limited to such assets, was not barred; there being no "present right to receive" on the part of the next of kin until the assets had been actually recovered by the administrator.—Part payment by the administrator out of a particular asset which has so fallen in will not revive the right to sue for general administration which was at the time of payment barred by statute. *In re* JOHNSON. SLY *v.* BLAKE - - 964

2. —— *Evidence—Entry against Interest—Payment of Interest—Agency.*] The representative of a deceased mortgagee brought in 1884 a foreclosure action against the mortgagor, who pleaded the Statutes of Limitations. There was no evidence that any interest had been paid since 1866, except an entry in the books of the mortgagee of £50 as paid in 1878 by the mortgagor for rent and interest;—*Held*, that though as an acknowledgment of money received it was against the interest of the person who made the entry, yet as it would prove the revival of a simple contract debt then barred, it was for his interest, and therefore could not be received as evidence on behalf of his representatives.—The solicitor of a mortgagor paid the interest to the mortgagee, and it was taken into account between them up to 1866. From that time the solicitor continued to pay the interest, but there was no proof that he acted as agent for the mortgagor or that the mortgagor furnished the money:—*Held*, in a foreclosure action brought in 1884, that there had been no sufficient payment of interest to take the case out of the Statutes of Limitations, and that the action was barred. NEWBOULD *v.* SMITH 882

LONG TERM—Enlargement into fee - 1007, *See* LEASEHOLD. [1009, n.

LUNATIC—*Lunacy Regulation Act*, 1853 (16 & 17 *Vict. c.* 70), *s.* 118—*Charge of Expenses of Improvements.*] A lunatic was tenant for life of the H. estate, and tenant in tail in possession of the D. estate. Expenses were incurred by the committee in improvements on both estates, but chiefly on the former:—*Held*, that there was no jurisdiction to charge the D. estate with the expenses incurred on the H. estate. *In re* VAVASOUR - - - - - C. A. 306

MAINTENANCE—Infant - - 331, 921
See INFANT. 1, 2.

MARGINAL ADVICE—Bill of exchange—Consignments of goods - - - 813
See BILL OF EXCHANGE. 1.

MARRIED WOMAN - - - 177, 996
See HUSBAND AND WIFE. 1, 2.

MEDICAL PRACTITIONER—*Unqualified Person—Right to sue—Apothecaries Act.* (55 *Geo.* 3, *c.* 194), *s.* 14—*Medical Act*, 1858 (21 & 22 *Vict. c.* 90), *ss.* 32, 40.] The Act 55 Geo. 3, c. 194, prohibiting medical practice by unqualified persons is not repealed by implication by the Medical Act, 1858.—The Defendant, a duly qualified medical practitioner, agreed with the Plaintiff, a medical practitioner not duly qualified, but who was described in the agreement as "medical practitioner," to serve the Plaintiff as assistant in his profession as a medical practitioner, and not to practise at R. within five years after the close of the engagement. The Plaintiff applied for an injunction to prevent the Defendant from prac-

MEDICAL PRACTITIONER—*continued.*

tising at R. in breach of this agreement:—*Held*, by Pearson, J., that the Medical Act of 1858 does not prohibit unqualified persons from practising medicine, its object being only to enable the public to distinguish between qualified and unqualified practitioners—that the use by an unqualified person in a private agreement with another medical man, of any of the titles for the wilful use of which by an unqualified person, for the purpose of deceiving the public, penalties are imposed by sect. 40 of the Act, is not an offence within that section—that the agreement therefore was not illegal, and that the Plaintiff could enforce its terms, and was entitled to an injunction.—The Defendant appealed, and on appeal shewed that the Plaintiff had given various certificates of cause of death, which shewed that the Plaintiff had attended the deceased persons during their last illness, and from which it was to be inferred that he attended patients in the way in which a medical practitioner ordinarily attends, and in fact personally acted as an apothecary:—*Held*, that his doing so was made illegal by the Act 55 Geo. 3, c. 194, s. 14, that the agreement therefore was to assist the Plaintiff in carrying on a business which he could not lawfully carry on, and that the agreement was illegal and could not be enforced:—*Semble*, if the Plaintiff had carried on his business by means of duly qualified assistants, without personally acting as a physician, surgeon, or apothecary, the agreement might have been legal. Davies *v.* Makuna C. A. 596

MEETING OF SHAREHOLDERS—Fourteen days notice—Computation of time - 204
See Company. 8.

—— Poll - - - - - 159
See Company. 6.

MIDDLESEX REGISTRY ACT - - 702
See Registry Acts.

MISTAKE—Contributory - - - 459
See Company. 5.

—— Disentailing deed—Rectification - 133
See Tenant in Tail.

—— Law — Ultrà vires act — Overdrawing bankers' account - - - 902
See Building Society. 2.

—— Payment by—Interest on purchase-money
See Vendor and Purchaser. 4. [691

MONEY—Rent having no money value—Silver penny - - - - 1007
See Vendor and Purchaser. 3.

MORTGAGE—*Priority—Deposit of Certificates of Shares—Lien of Company on Shares for Moneys due from Shareholder—Notice.*] The articles of association of a company provided that the company should have a first and permanent lien and charge, available at law and in equity, on every share, for all debts due from the shareholder to the company. A shareholder deposited the certificates of his shares with his bankers as security for the balance then due from him to them on his current account, and notice of the deposit was given to the company:—*Held*, that *Hopkinson* v. *Rolt* (9 H. L. C. 514) applied, and that the company could not claim priority over the bankers in respect of moneys which became due from the

MORTGAGE—*continued.*

shareholder to the company after notice of the bankers' advance, but that the bankers were entitled to priority. Bradford Banking Company *v.* Briggs & Co. - - - - 149

2. —— *Priority—Fund in Court—Notice of Prior Incumbrance to Second Incumbrancer—Stop Order.*] A second incumbrancer of a fund in Court, who at the time of taking his security had notice of the existence of the first incumbrance, cannot by obtaining a stop order gain priority over the first incumbrancer, even although the latter never obtains a stop order. *In re* A. D. Holmes - - - - - C. A. 786

3. —— *Priority — Legal Mortgage — Subsequent Deposit of Deeds—Negligence—Recovery of Deeds — Purchase for Value without Notice — Judicature Act*, 1873, *s.* 25, *sub-s.* 11.] A legal mortgagee had asked for the deeds which the mortgagor, who was his solicitor, made excuses for not giving to him. The mortgagor afterwards deposited the deeds with another mortgagee as security for money advanced without notice of the legal mortgage:—*Held*, in an action by the legal mortgagee for foreclosure, that he had not been guilty of fraud or negligence amounting to fraud, and that he could not be postponed to the mortgagee by deposit by reason of any negligence short of that:—*Held*, that the legal mortgagee was entitled to recover the deeds from the mortgagee by deposit, notwithstanding he was a purchaser for value without notice; and that sect. 25, sub-sect. 11, of the Judicature Act, 1873, did not alter the rule of law on the subject. Manners *v.* Mew - - - 725

4. —— *Priority — Negligence—Postponement of Holder of Legal Estate—Trustee of Marriage Settlement—Notice of Marriage of Mortgagor—Duty of Mortgagee to inquire as to Settlement.*] In November, 1875, a husband deposited with his bankers the title deeds of some leasehold houses, together with a memorandum of deposit, as a continuing security to the bankers for any overdraft of his wife's current account with them. In November, 1876, he died, having bequeathed all his property to his wife, and appointed her his executrix. After his death the deeds remained with the bankers, and the widow was allowed on the security of them to overdraw her account. In May, 1877, she married again. Prior to the marriage the houses were assigned by her to a trustee on trust for herself for life, and after her death on trust for an infant son of her first marriage absolutely. Power was given to the trustee to sell the houses during the life of the wife, at her request, and after her death at the discretion of the trustee. The trustee made no inquiry about the title deeds, and no notice of the settlement was given to the bankers. In June, 1877, the husband and wife gave notice to the bankers, of their marriage, and at their request a balance which then stood to the credit of the wife's current account, was transferred to a new current account opened by the bankers with the husband. The deeds remained with the bankers, but no notice of the settlement was given to them. In November, 1877, at the request of the bankers, the probate of the first husband's will was sent to them, and at their request a new memorandum

MORTGAGE—*continued.*

of deposit was in January, 1878, signed by the husband and wife, making the deeds a continuing security to the bankers for any overdraft of the husband's current account. In April, 1878, the wife died. The deeds were still with the bankers, and at that time the husband's current account was in credit. In 1883 the trustee made some inquiries, and then discovered that the deeds, which he had believed to be in the custody of the solicitor who had prepared the settlement, were with the bankers. He then gave the bankers notice of the settlement, and claimed the deeds. This was the first notice that the bankers had had of the settlement:—*Held*, that the omission of the trustee to inquire for the title deeds was negligence of such a character as prevented him from availing himself of the legal estate to give him priority over the equitable charge of the bankers, and that the cestui que trust stood in no better position.—*Held*, that the bankers were entitled to priority in respect of the amount due to them on their security at the time when they received notice of the settlement.—When a married woman executes a mortgage there is no obligation on the mortgagee to inquire whether a settlement was made on her marriage. LLOYD'S BANKING COMPANY *v.* JONES - - - - - 221

5. —— *Sale by Mortgagor and First Mortgagee—Notice of Second Mortgage—Proceeds of Sale, how to be applied.*] A mortgagor of a leasehold house, with the concurrence of the first mortgagees, who had notice of a second equitable mortgage, sold the property. Upon completion, the balance of the purchase-money, after payment of the first mortgagees, was handed to the mortgagor.—In an action by the second mortgagees against the mortgagor (who did not appear) and the first mortgagees:—*Held* (affirming Bacon, V.C.), that the first mortgagees were liable to make good to the Plaintiffs the amount of their security to the extent of the balance of the purchase-money.—The doctrine in *Peacock* v. *Burt* (4 L. J. (N.S.) (Ch.) 33) will not be extended.—Dictum of Wood, V.C., in *Bates* v. *Johnson* (Joh. 304, 313, 314), as to the right of a first mortgagee to transfer to a third mortgagee in preference to the second, questioned. WEST LONDON COMMERCIAL BANK *v.* RELIANCE PERMANENT BUILDING SOCIETY - - - - - C. A. 954

—— Charity—Mortmain - - - 947
See CHARITY. 2.

—— Loan by non-members to building society—Priority - - - - 182
See BUILDING SOCIETY. 1.

—— Priority—Debentures of company - 715
See COMPANY. 4.

—— Priority—Middlesex Registry Act - 702
See REGISTRY ACTS.

—— Renewable lease—Purchase of reversion
See RENEWABLE LEASE. 2. [231

—— Statute of Limitations - - - 882
See LIMITATIONS, STATUTE OF. 2.

MORTMAIN - - - - - 947
See CHARITY. 2.

—— Lapsed bequest—Exoneration from debts
See WILL. 2. [145

NE EXEAT REGNO—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 6.] An order was made that a trustee should within seven days after service of the order pay to his cestui que trust, the Plaintiff, a sum found due to him by the Chief Clerk's certificate. The Plaintiff could not find the trustee so as to serve the order, and applied for a writ of ne exeat on the ground that the trustee was about to go out of the jurisdiction:—*Held*, that the case did not fall within the third exception in sect. 4 of the Debtors Act, 1869, the trustee not being in default, as the order only directed payment after service and had not been served, and that as the debt was not now due and payble a writ of ne exeat could not be granted. COLVERSON *v.* BLOOMFIELD - - C. A. 341

NEGLIGENCE—Priority of mortgages - 221
See MORTGAGE. 4.

NOTICE—Mortgage—Stop order - - 786
See MORTGAGE. 2.

—— Second mortgagee—Proceeds of sale 954
See MORTGAGE. 5.

NUISANCE—Cattle station on railway - 89
See RAILWAY COMPANY. 1.

—— Pollution of well - - - 115
See WATER.

ORDER TO PAY MONEY—Equitable assignment
See ASSIGNMENT OF DEBT. [128

PARTICULARS OF BREACHES—Costs - 366
See PATENT. 3.

PARTICULARS OF OBJECTION—Patent—Costs
See PATENT. 1. [325

PARTNERSHIP—*Premium—Judgment for Dissolution—Order for Accounts being prosecuted—Summons for Direction for a Return of Part of Premium.*] Where a Plaintiff, who entered into a partnership for a long term of years and paid a premium, of which, in certain events, that did not happen, he was to have a proportion returned to him, obtained judgment for a dissolution and an order for accounts and inquiries, and after the accounts had been prosecuted, asked, by summons, for a direction that he was entitled to be credited with a sum as for return of premium, the Court *held*, that though it had the power to make an addition to the judgment, yet as the Plaintiff knew all the facts at the time when it was pronounced, had present to his mind the question whether he was or not entitled to any such return, and came to the conclusion that he was not, this was not a case in which the relief asked for should be granted, and dismissed the summons with costs.—In partnership cases relief is given by directing a return of premium as for partial failure of the consideration, but such relief ought not to be granted without the leave of the Court, after decree made declaring the partnership dissolved, and directing the usual accounts to be taken; and leave ought not to be given unless the circumstances are such as would have authorized the Court to give leave to bring a supplemental action. EDMONDS *v.* ROBINSON - 170

PATENT — *Costs — Discretion — Patent Law Amendment Act*, 1852 (15 & 16 *Vict. c.* 83), *s.* 43

PATENT—*continued.*

—*Lord Cairns' Act* (21 & 22 *Vict. c.* 27)—*Sir J. Rolt's Act* (25 & 26 *Vict. c.* 42).] In an action in the Court of the County Palatine to restrain infringement of a patent the Defendants delivered particulars of objection. At the trial the Judge held the patent invalid for an objection appearing on the face of it, and dismissed the action with costs, stating his opinion that the Defendants ought to have the costs of the witnesses brought up to support their particulars of objection, though they had not been called, as the Plaintiffs virtually had been non-suited. On taxation the Registrar disallowed these costs, but the Vice-Chancellor held that they must be allowed. The Plaintiffs appealed:—*Held*, that neither Lord Cairns' Act (21 & 22 Vict. c. 27), nor Sir J. Rolt's Act (25 & 26 Vict. c. 42) made it obligatory on a Court of Equity to follow the rule as to costs of particulars of objections laid down by the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), s. 43, and that the rule which applied to Courts having no discretion as to costs ought not to be followed by analogy by a Court which had discretion as to costs; that the Vice-Chancellor had therefore power to give these costs, and that they must be allowed. Parnell *v.* Mort, Liddell, & Co. - - - **C. A. 325**

2. —— *Importation and User of Apparatus made Abroad according to the Specification of an English Patent—Infringement—User for Experiment and Instruction.*] User of a pirated article for the purpose of experiment and instruction is user for advantage, and an infringement of the patent.—The Defendant, an English electrician, purchased and imported from foreign manufacturers apparatus which if made here would have infringed the Plaintiff's patent. The Defendant maintained that he had only purchased the apparatus for examination and experiment by himself and his pupils, as certain royalty-paid instruments in his possession were too expensive to be taken to pieces; and he insisted that he had never sold, and had never otherwise used the apparatus:—*Held*, that such user of the pirated apparatus by the Defendant was a user for advantage and an infringement of the patent. United Telephone Company *v.* Sharples **164**

3. —— *Utility — Specification— Sufficiency— Ambiguity — Chemical Process — Isomeric Substances—Costs—Plaintiff successful in some Issues and not in others*—15 & 16 *Vict. c.* 83, *s.* 43—*Certificate as to Validity.*] Two isomeric forms of a chemical product N., called A. N. and B. N., were known to exist at the date of Plaintiff's patent, but one only was known in commerce, the other being only mentioned in scientific books. B. N. had only been known for a few years, before which time, and to some extent afterwards, A. N. had been known as N. The Plaintiffs' specification, which was from its nature addressed to advanced students of organic chemistry, mentioned N. as an important factor in his process, without stating whether it was A. N. or B. N.—*Held*, by the Court of Appeal (dissentiente Baggallay, L.J.), that the specification was insufficient for ambiguity.—When the specification of a patent for a chemical process applies equally to several isomeric substances, but one only would

PATENT—*continued.*

produce a useful result, and it can only be ascertained by experiment which that is, the patent is invalid.—Observations on the necessity of proof by the Plaintiff that the invention has been worked, when the utility of the invention and the sufficiency of the specification are in issue.—A patentee failed in establishing the validity of his patent, but succeeded on the issue of infringement:—*Held*, that the Plaintiff must pay the general costs of the action, but that the Defendant must pay the costs occasioned by the issue of infringement, the one set of costs to be set off against the other.—A certificate under 15 & 16 Vict. c. 83, s. 43, that the validity of a patent came in question in the action cannot be obtained by the Defendant in an action for infringement. Badische Anilin und Soda Fabrik *v.* Levinstein - - - - **C. A. 366**

PAYMENT INTO COURT - - - **351**
See Practice. 12.

PENDING BUSINESS—Remuneration of solicitor
See Solicitor. 3. [**608**

PENDING LITIGATION—Costs of trustee—New and old rules of court - - **495**
See Practice. 5.

PERPETUITY—Testamentary power - **521**
See Power. 2.

PETITION — Reduction of capital — Advertisement - - - - - **683**
See Company. 7.

POLL—Meeting of shareholders - - **159**
See Company. 6.

POLLUTION OF WELL—Nuisance - **115**
See Water.

POWER—*Appointment to Second Set of Trustees —Wilful Default.*] Property was assigned to trustees on trust for S. for life, and after her death to such of her issue as she should by will appoint; the settlor and S. during their joint lives, and the survivor, had a power of appointment of new trustees and discretion as to the investments, and the settlor had a power of revocation, which however he did not exercise. S. by her will appointed to B. and N. the property as trustees for her son. After her death the settlor appointed L. and N. trustees of the settlement, and the property was transferred to them. The son of S. died, and B. died. L. had allowed the property to remain in the hands of N., who had made away with it.—The persons beneficially entitled under the will of the son recovered judgment for the property made away with against the executor of the son on the ground of wilful default. The executor brought an action against L. for the property as having been lost by his wilful default in allowing it to remain in the hands of N.:—*Held*, that S. had power to appoint the property to trustees for her son; that as he took the whole beneficial interest the trustees of the settlement had no duties to perform except to hand the property over to the surviving trustee of the will; that therefore N. was rightfully in possession of the property, and L. was not liable for having allowed it to remain in the hands of N.—*In re Pocock's Policy* (Law Rep. 6 Ch. 445), *Ferrier* v. *Jay* (Law Rep. 10 Eq. 550), and *Bush*

POWER—*continued.*

v. *Aldam* (Law Rep. 19 Eq. 16), observed upon.—*Held*, that as the persons entitled under the will of the son of S. had chosen to proceed and recover against his executor, the executor could recover again from the trustee of the settlement if he had been guilty of wilful default. SCOTNEY *v.* LOMER - - - - - - 535

2. —— *Married Woman—General Testamentary Power—Remoteness.*] A married woman exercised a general testamentary power:—*Held*, that time under the rule against perpetuities ran from her death, and not from the date of the instrument creating the power.—*In re Powell's Trusts* (39 L. J. (Ch.) 188) discussed and not followed. ROUS *v.* JACKSON - - - 521

—— Appointment—Exercise by trustee in liquidation - - - - 1005
See BANKRUPTCY. 1.

—— Appointment of new trustees - - 247
See SETTLEMENT. 3.

—— Investment by trustees - - 889
See TRUSTEE. 2.

—— Revocation—Voluntary settlement - 212
See VOLUNTARY SETTLEMENT.

POWER OF ATTORNEY—*Recital—Control of operative Part—Complicity in Fraud—Notice.*] The operative part of a power of attorney appointed X. and Y. to be the attorneys of the Plaintiff without in terms limiting the duration of their powers, but it was preceded by a recital that the Plaintiff was going abroad, and was desirous of appointing attorneys to act for him during his absence:—*Held*, that the recital controlled the generality of the operative part of the instrument, and limited the exercise of the powers of the attorneys to the period of the Plaintiff's absence from this country.—During the Plaintiff's absence from England, and again after his return, X. and Y., without his knowledge and purporting to act under the power, which empowered them to borrow money on mortgage, borrowed moneys from a bank upon the security of charges on the Plaintiff's property, which moneys they afterwards misappropriated. Upon the occasion of the first advance the power was produced to the bankers and registered by their clerk, but it was not examined by them, nor were they aware that the Plaintiff was in England when they made the second advance:—*Held*, that the charge given during the Plaintiff's absence was valid, and that the charge given after his return was invalid.—The Plaintiff went abroad a second time, and before going gave a fresh power to X. and Y., by which, after referring to the former power, and reciting that he had been in England for a short time, and was returning abroad, he appointed X. and Y. his attorneys, giving them power to borrow money for him with or without giving security. During his second absence, and without his knowledge, X. and Y., who themselves had an overdrawn account with the bankers, borrowed from them further moneys, alleging that it was to enable them to make payments for the Plaintiff; and under the second power of attorney they charged the Plaintiff's property as a security for the loan, applying the borrowed moneys in reduction of their own debt

POWER OF ATTORNEY—*continued.*

to the bank. Upon this occasion the second power was produced to the solicitor of the bank, but he was unacquainted with the former transactions, and neither the bankers nor any of their clerks were aware that the Plaintiff had been in England:—*Held*, that in order to make out that the bank were so put upon inquiry as to invalidate the transaction, the Plaintiff must shew that the recitals in the second power were seen by some agent of theirs who knew of the previous transactions, and would by those recitals have been rendered suspicious of the good faith of X. and Y.; and consequently that there having been no such notice or knowledge on the part of the bank, wilful blindness could not be imputed to them, and the last-mentioned charge was valid. DANBY *v.* COUTTS & Co. - - - 500

PRACTICE—*Adding co-Plaintiff—Rules of Supreme Court*, 1883, *Order XVI., r.* 11.] The tenant for life of a trust fund brought an action against the trustees to make them liable for an improper investment. The trustees by their defence alleged that they had made the investment in question at the request of the Plaintiff. The Plaintiff thereupon applied for leave to amend by adding as co-Plaintiff his son, who had a reversionary interest in the fund, and Bacon, V.-C., made an order giving him leave:—*Held*, on appeal, that the order must be discharged, for that Order XVI., rule 11, does not authorize the allowing a Plaintiff who has no right to sue, to amend by joining as co-Plaintiff a person who has such right. WALCOTT *v.* LYONS - - - C. A. 584

2. —— *Adding Parties—Rules of the Supreme Court*, 1883, *Order XVI., r.* 11.] In an action by a company, lessees for a long term of eleven houses, of which ten were unlet and in their possession when the writ was issued, and by their tenant of the remaining house as co-Plaintiff, for an injunction and damages in respect of an alleged nuisance from noise; the tenant, after delivery of the statement of claim and notice of trial, refused to go on with the action as co-Plaintiff. The other ten houses having in the meantime been let, the Plaintiff company applied at the trial for leave to amend by adding as co-Plaintiffs two of the new tenants, who consented to be added.—Application granted as being within the discretion given by Rules of the Supreme Court, 1883, Order XVI., rule 11, of allowing the names of any parties, whether plaintiffs or defendants—"whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter"—to be added. HOUSE PROPERTY AND INVESTMENT COMPANY *v.* H. P. HORSE NAIL COMPANY 190

3. —— *Administration Judgment—Cestui que trust—Residuary Legatee—Infant Plaintiff—Limited Accounts and Inquiries—Costs—Rules of Supreme Court*, 1883, *Order LV., rr.* 3, 4, 10; *Order LXV., r.* 1—*Devise—Trustees—Trust for Sale—Postponing Sale—Discretion.*] A party interested in the estate of a deceased person, even though that party be an infant, is not entitled, as a matter of course, to an administration judgment at the expense of the estate. Having regard to Rules of Supreme Court, 1883, Order LV., rule 10,

PRACTICE—*continued.*

a party interested is only entitled to an administration judgment where there are questions which cannot be properly determined except by an administration action; but the Court has power under that rule to order a limited administration only, that is, to direct particular accounts and inquiries, if it sees that the questions can thus be properly determined, the object of the rule being to prevent general administration except in cases of necessity; and the Court, in the exercise of its discretion as to costs under Order LXV., rule 1, will order the Plaintiff—if an infant, then the next friend—to pay the costs of any unnecessary or improper administration proceedings.—Order of Kay, J., varied.—*In re Wilson* (28 Ch. D. 457) considered.—Where real estate is devised to trustees in trust for sale, with a discretionary power to postpone the sale, the Court will not interfere with a bonâ fide exercise of their discretion as to the time and mode of sale. *In re* BLAKE. JONES *v.* BLAKE - - - - C. A. 913

4. —— *Appeal for Costs.*] Where the jurisdiction of a Judge to inflict costs on a party arises from his being guilty of breach of an injunction or other misconduct, an appeal lies as to costs, although the Judge makes no order except that the party shall pay costs.—*Witt* v. *Corcoran* (2 Ch. D. 69) followed. STEVENS *v.* METROPOLITAN DISTRICT RAILWAY COMPANY - - C. A. 60

5. —— *Appeal for Costs—Administration Action by Residuary Legatee—Rules of the Supreme Court*, 1883, *Order* LXV., *r.* 1—*Pending Cause—Rules of Court*, 1875, *Order* LV., *r.* 1.] Order LXV., rule 1, of the Rules of the Supreme Court, 1883, directing that the costs of all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or a Judge, applies, in the case of causes and matters pending on the 24th of October, 1883, when those rules came into operation, only to the costs of proceedings taken on and after that day; and the costs incurred in proceedings taken in such causes and matters before that day, although not adjudicated upon until afterwards, are not within that rule.—In an action for administration by one of several residuary legatees, all the proceedings except those on subsequent further consideration were taken before Order LXV., rule 1, came into operation, though the costs were not adjudicated upon until the order on further consideration which was made afterwards:—*Held*, that an appeal would lie as to the costs of such prior, though not as to the costs of such subsequent proceedings.—*Farrow* v. *Austin* (18 Ch. D. 58) followed. *In re* MCCLELLAN. MCCLELLAN *v.* MCCLELLAN [C. A. 495

6. —— *Costs—Appeal—Note of Judgment of Court below.*] A decision on the construction of a will was reversed on appeal, but the Court, on the ground that it was not furnished with any information as to the reasons given by the Judge for his decision, refused to make any order as to the costs of the appeal. *In re* MCCONNELL. SAUNDERS *v.* MCCONNELL - - - - - C. A. 76

7. —— *Costs—Action dismissed for want of Prosecution—4 & 5 Anne, c. 3, s. 23—42 & 43 Vict. c. 59, ss. 2, 4—Repeal with Qualification—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1—*Discretion of Judge as to Costs—Appeal.*] The statutable right of a Defendant to the costs of an action in the Chancery Division which had been dismissed for want of prosecution was repealed by 42 & 43 Vict. c. 59, which repeals so much of 4 & 5 Anne, c. 3, as gives such costs, and though the practice in accordance with such statutable right, and as regulated by Order XXXIII., rule 10, of the Chancery Consolidation Orders of 1860, was preserved by sect. 4 of 42 & 43 Vict. c. 59, yet Order LXV., rule 1, of the rules of 1883 has changed such practice, so that the costs of a Defendant where such action has been dismissed for want of prosecution are now in the discretion of the Judge, and therefore his order as to such costs is by sect. 49 of the Judicature Act, 1873, not subject to appeal. SNELLING *v.* PULLING [C. A. 85

8. —— *Evidence—Affidavit—Cross-Examination — Expenses of Deponent—Rules of Supreme Court*, 1883, *Order* XXXVII., *rr.* 9, 13, 20, 21—*Order* XXXVIII., *r.* 28.] Plaintiff after judgment in an administration action having obtained an order for cross-examination of Defendant (the executor) upon his affidavit, in answer to inquiries directed by the judgment, denying possession of any part of the testator's estate, Defendant declined to attend before the examiner until Plaintiff had paid his expenses. Plaintiff having subsequently served Defendant with a subpœna moved that he be ordered to attend at his own expense:—*Held*, that it was open to the Plaintiff to combine the two methods of procedure, and that the Defendant was bound to produce himself at his own expense for cross-examination; and further, that regarding the Defendant as a deponent whose attendance was required for cross-examination, the penalty imposed by Order XXXVIII., rule 28, of having his affidavit rejected did not relieve him from the obligation to attend at his own expense. *In re* BAKER. CONNELL *v.* BAKER - - 711

9. —— *Interrogatories—Discovery—Discovery of Plaintiff's Evidence.*] B. and N., two landowners in the parish of M., brought an action for a declaration that a piece of land formed part of M. Common, and to establish commonable rights thereover. N. sued as owner in fee of a beerhouse and three cottages, and the Plaintiffs pleaded the exercise of the rights claimed from time immemorial. The Defendant was the lord of an adjacent manor, and his defence was that the piece of land never formed part of M. Common, but was common land forming part of his own manor; that if the Plaintiffs ever had any rights of common thereon such rights had been extinguished; that some of the rights claimed could only be used in respect of ancient tenements, and that the beerhouse and three cottages in respect of which N. sued had no land held therewith. After the defence had been delivered the Defendant administered interrogatories to the Plaintiffs, asking in effect:—1. How long the Plaintiffs had been owners or occupiers of their properties, and for what estates, what was the tenure thereof, and whether those lands were within the limits of any and what actual or reputed manors, and whether any such premises

PRACTICE—*continued.*

were ancient messuages, and whether the beerhouse and three cottages had any and what lands appurtenant thereto or held therewith. 2ndly. Whether the Plaintiffs or their predecessors in title, as proprietors or occupiers of any lands in M., or under any other alleged title, had exercised the rights claimed upon any and what parts of M. Common, or upon any and what part of the piece of land in question. 3rdly. The Plaintiffs were asked to set forth particulars of their exercise of such rights, and whether they did so by any license or in consideration of any and what payment. The Plaintiffs objected to answer these interrogatories on the ground that they related exclusively to their own title and to the evidence they should adduce at the hearing.—Upon a summons that the Plaintiffs might be ordered to make a sufficient answer:—*Held*, by Kay, J., that the Plaintiff N. must answer so much of the first interrogatory as asked, whether the beerhouse and cottages had any lands appurtenant thereto or held therewith, because he had not pleaded that they had, and the Defendant had pleaded that they had not; but that the rest of the interrogatories need not be answered, because they were in effect directed to the discovery of the evidence by which the Plaintiffs intended to prove their case at the hearing.—*Eade* v. *Jacobs* (3 Ex. D. 335) and *Hoffmann* v. *Postill* (Law Rep. 4 Ch. 673) explained.—*Lowndes* v. *Davies* (6 Sm. 468) dissented from.—On appeal by the Defendant the question was left to the Judges of the Court of Appeal as arbitrators to settle what parts of the interrogatories should be answered, and the Plaintiffs were directed to answer further parts of them. BIDDER *v.* BRIDGES - - - C. A. 29

10. —— *Judgment — Alteration of Order — Foreclosure Order—Rules of Supreme Court*, 1883, *Order* XV., *r.* 1—*Order* XXVIII., *r.* 11.] The Plaintiffs in a foreclosure action applied by summons under Order XV., rule 1, for an account. The Chief Clerk pronounced the usual order for an account and foreclosure. The Defendants objected to the direction for foreclosure, and the Plaintiffs assenting, the order was drawn up for an account only, and was passed and entered in that form. When the parties came before the Chief Clerk to proceed with the account he objected to the order as not being the one he had pronounced, and refused to proceed with the account. Subsequently the Registrar, at the instance of the Chief Clerk, without any motion or summons, altered the order by adding the usual directions for foreclosure. The Defendants moved to strike out the additions. Kay, J., declined to do so, as he considered that the parties were not at liberty to have an order drawn up, different from the order pronounced, without applying to the Court for the purpose; but, being of opinion that the addition had been irregularly made, he stayed proceedings under the existing order, giving the Plaintiffs liberty to apply for a fresh order for accounts and foreclosure. The Defendants appealed:—*Held*, that assuming the order as passed and entered to contain an error arising from an accidental slip or omission, an alteration made in it without any motion or summons for the purpose was irregular, and must be discharged, and that the Plaintiffs must pay the costs, as they ought to have applied to the Judge when the Chief Clerk refused to proceed with the accounts.—Whether a foreclosure order can be made under Order XV., rule 1, as in *Smith* v. *Davies* (28 Ch. D. 650), *quære*.—Whether there was jurisdiction to stay proceedings under the order against the wish of the Defendants, *quære*. BLAKE *v.* HARVEY - - C. A. 827

11. —— *Judgment by Default—Appeal—Rules of Supreme Court*, 1883, *Order* XXXVI., *r.* 33.] Although the Court of Appeal has jurisdiction to hear a direct appeal from a judgment by default, such appeals will not be encouraged. The proper course for a party against whom judgment has been given by default is to apply to the Judge who heard the cause to set aside the judgment and to re-hear the cause. VINT *v.* HUDSPITH C. A. 322

12. —— *Payment into Court—Appeal—Order to pay Plaintiff instead of paying into Court—Service on Solicitor — Continuance of Authority of Solicitor.*] By order on further consideration the Defendant was ordered to pay money into Court, which was then to be carried to the credit of an action for administering the estate of a testator whose executrix was the Plaintiff in the present action. The Defendant went abroad without complying with the order. On appeal the order was varied by ordering the Defendant to pay the money to the Plaintiff, who was then to pay it into Court in the administration action, such an order being capable of being better enforced against the Defendant's property than the order as originally framed.—The notice of appeal was served on the Defendant's solicitors, who stated that they had ceased to act for him, but they were still his solicitors on the record:—*Held*, that as the order on further consideration had not been worked out, they still represented him, and that service of the notice on them was good service.—Whether the solicitors on the record do not continue to represent their client until the expiration of the time allowed for appealing, *quære*. LADY DE LA POLE *v.* DICK - - - C. A. 351

13. —— *Preliminary Accounts and Inquiries —Rules of Supreme Court*, 1883, *Order* XXXIII., *r.* 2.] The Plaintiff, an equitable mortgagee, brought an action for foreclosure or sale against several other mortgagees, insisting that under the circumstances she was entitled to priority over the Defendants. The alleged priority of the Plaintiff to the Defendants depended on questions of notice and fraud. On the application of the Plaintiff, Kay, J., on summons under Order XXXIII., rule 2, made an order directing an inquiry what were the respective priorities of the incumbrances of the Plaintiff and the respective Defendants, and an account of what was due to the incumbrances respectively. One of the Defendants appealed:—*Held*, on appeal, that this order must be discharged, for that Order XXXIII., rule 2, was not intended to authorize the sending the whole of the questions in a cause to be tried in Chambers, but only to authorize the Court to direct, before trial, accounts and inquiries which would otherwise have been directed at the trial. GARNHAM *v.* SKIPPER - - - - C. A. 566

14. —— *Preliminary Accounts and Inquiries —Rules of Supreme Court*, 1883, *Order* XV., *r.* 1;

PRACTICE—*continued.*

Order LV., r. 10.] A mortgagee of shares of the proceeds of the residuary real and personal estate of a testator who died in 1872, brought an action in 1884 for the administration of the estate, alleging misapplication by one of the trustees of moneys raised by mortgage of parts of the real estate, and advances to the same trustee of parts of the testator's estate on equitable mortgage. The Plaintiff applied under Order XV., rule 1, for the common accounts and inquiries in an administration suit, and also for inquiries as to mortgages of the real estate and as to advances to the trustee. Bacon, V.C., refused to make any order:—*Held*, on appeal, that only common accounts and inquiries could be directed on an application under the rule, and not accounts and inquiries the right to which depended on the Plaintiff establishing a case for them at the hearing, and that the special inquiries therefore could not be directed.—*Held* further, that Order XV., rule 1, must be read in connection with Order LV., rule 10, which makes it not obligatory on the Court to order a general administration, and that the Vice-Chancellor was right in refusing the common accounts and inquiries in a case where, having regard to the period elapsed since the testator's death, it was uncertain whether a general administration order would be found at the hearing to be desirable, and where, if the Plaintiff at the hearing established a case of breach of trust, accounts and inquiries would have to be directed, going over in part the same ground as the common accounts and inquiries. *In re* Gyhon. Allen *v.* Taylor [C. A. 834

15. —— *Production of Documents—Husband and Wife—Affidavit as to Documents.*] A husband and wife sued as co-Plaintiffs in respect of an alleged breach of trust by the trustees of their marriage settlement. The wife had a life estate for her separate use, and sued without a next friend. An order was made that the Plaintiffs should file an affidavit stating "whether they or either of them" had in the possession or power "of them or either of them," any documents relating to the matters in question. They filed an affidavit admitting the possession of various documents, which they scheduled, and going on to say, "We have not now, and never had, in our possession, custody, or power, or in the possession, custody, or power of any other person or persons on our behalf, any deed, &c., other than and except the documents set forth in the said schedule":—*Held* (reversing the decision of Bacon, V.C.), that the Plaintiffs must be ordered to file a further and better affidavit, for that an affidavit relating only to documents in the joint custody of the husband and wife did not comply with the order, and that the order was right in requiring them to answer as to documents in the possession of either of them. Fendall *v.* O'Connell C. A. 899

16. —— *Production of Documents—Sufficient Affidavit—Interrogatory.*] After a Defendant has made a sufficient affidavit of documents the Plaintiff will not be allowed to administer to him a general roving interrogatory as to documents in his possession, the effect of which would be to compel the Defendant to make a further affidavit as to documents.—There may possibly be cases

PRACTICE—*continued.*

in which, after a sufficient affidavit as to documents has been made, the Court will allow the Plaintiff to deliver an interrogatory as to some specific document or documents, but whether this shall be allowed is a matter within the discretion of the Judge in each particular case, and, though his decision can be appealed from, the Court of Appeal will not readily reverse it.—*Jones* v. *Monte Video Gas Company* (5 Q. B. D. 556) explained. Hall *v.* Truman, Hanbury, & Co. - C. A. 307

17. —— *Receiver—Equitable Execution—Rules of Supreme Court*, 1883, *Order XLII., rr.* 4, 28—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8.] Under the general power to appoint receivers given by the Judicature Act, 1873, s. 25, sub-s. 8, and having regard to Rules of Supreme Court, 1883, Order XLII., rules 4 and 28, the Court has jurisdiction to enforce a judgment for payment of money into Court by a defaulting trustee, by the appointment of a receiver of his equitable interest in property in this country; and order accordingly where, from the debtor being out of the jurisdiction, service of a writ of attachment could not be effected. *In re* Coney. Coney *v.* Bennett 993

18. —— *Security for Costs—Dismissal of Appeal for want of Security.*] Where an order has been made for the Appellant to give security for the costs of an appeal, if he does not give it within a reasonable time, the Court will dismiss the appeal without giving further time, unless there are extenuating circumstances.—As a general rule a period of three months is more than a reasonable time. Washburn and Moen Manufacturing Company *v.* Patterson - - - C. A. 48

19. —— *Service out of the Jurisdiction—Rules of Supreme Court*, 1883, *Order XI., r.* 1, *sub-s.* (*f*).] The Court will exercise discretion in allowing or disallowing service out of the jurisdiction, and in so doing will consider evidence as to the merits. Société Générale de Paris *v.* Dreyfus Brothers - - - - - 239

20. —— *Third-party Procedure—Claim of Indemnity—Rules of Supreme Court*, 1883, *Order XVI., r.* 48—*Embarrassing Pleading.*] In giving leave to a Defendant to serve notice of claim for contribution or indemnity on a third party, the Court will not consider whether the claim is a valid one, but only whether the claim is bonâ fide, and whether if established it will result in contribution or indemnity.—The Plaintiff, who was the owner of stock in a public company registered in her name, ascertained that it had been transferred to F. by virtue, as she alleged, of a forged transfer. She brought an action against the company to have her name reinstated in the books of the company. The company obtained leave to serve F. with a claim for indemnity:—*Held*, by the Court of Appeal, without deciding that the claim for indemnity was valid, that leave to serve F. was rightly given.—*Speller* v. *Bristol Steam Navigation Company* (13 Q. B. D. 96) distinguished. Carshore *v.* North Eastern Railway Company - - - - C. A. 344

21. —— *Trial by Jury—Action assigned to Chancery Division—Joinder of Cause of Action not so assigned—Rules of Supreme Court*, 1883, *Order XXXVI., rr.* 3, 6.] The Plaintiff commenced

PRACTICE—*continued.*

an action in the Chancery Division alleging that the Defendant was trustee of a sum of £700 for her, and claiming payment of that sum with interest, and, if necessary, an account of profits made by the Defendant by using it in his business, and also claiming the return of certain chattels, or their value, and damages for their detention. The Defendant denied the trust, stated that the money had been lent to him by the Plaintiff, and long ago repaid, and denied that he ever had any chattels of the Plaintiff in his possession. The Plaintiff, after the defence had been put in, applied to have the issues of fact tried by a jury:—*Held*, by Pearson, J., and by the Court of Appeal, that the action came within Order XXXVI., rule 3, and not within rule 6 of the same Order. That the action therefore was to be tried by a judge without a jury, unless it could be made out that it was better to have it tried by jury, and that in the present case this was not shewn. GARDNER *v.* JAY - - - - C. A. 50

22. —— *Trial—Venue—Mode of Trial—Rules of Supreme Court*, 1883, *Order XXXVI., r.* 1.] The Plaintiff in an action to set aside deeds on the ground of fraud, named Cardigan as the place of trial in his statement of claim. On motion by a Defendant before issue joined, the Court ordered the action to be tried in the Chancery Division without a jury, and this decision was affirmed by the Court of Appeal. POWELL *v.* COBB C. A. 486

—— Patent action - - - 325, 366
See PATENT. 1, 3.

—— Point of law—Dismissal of action - 128
See ASSIGNMENT OF DEBT.

—— Stop order - - - - 786
See MORTGAGE. 2.

PRELIMINARY ACCOUNTS - 566, 834
See PRACTICE. 13, 14.

PREMIUM—Partnership—Return of part 170
See PARTNERSHIP.

PRINCIPAL AND AGENT—*Agent for purchase—Sale of Agent's own Property to Principal—Non-disclosure—Account of Profit made by Agent—Director—Misfeasance.*] In 1871 certain coal areas were purchased for £5500 by six persons, of whom F. was one, and were vested in G. as a trustee for them without disclosing the trust. In 1873 a company was formed for the purpose of purchasing these areas and other property. F. was one of the directors, and as such he concurred in effecting a purchase by the company from G. for £12,000 cash, and £30,000 in fully paid-up shares, without disclosing the fact that F. was a part owner. In 1875 the company was ordered to be wound up. In 1878 a meeting of contributories was called, at which two rival schemes were brought forward, one for repudiating the purchase of the coal areas, the other for adopting the purchase and selling the property. The latter scheme was adopted, and was confirmed by the Court. The liquidator accordingly sold the property, but at a heavy loss. A contributory then took out a summons under sect. 165 of the Companies Act, 1862, to make F. liable for misfeasance as a director in allowing the company's seal to be affixed to the agreement for purchase by the company. Mr. Justice Pearson dismissed the summons, holding

PRINCIPAL AND AGENT—*continued.*

that though the company would have been entitled to rescind the contract, yet as rescission had become impossible no relief could be given against F.; that as F. when he acquired his interest in the property was not a trustee for the company, he could not be treated as having purchased on behalf of the company at the price he gave, and therefore was not chargeable with the difference between the price at which he bought and the price paid by the company, and that he could not be charged with the difference between the price paid by the company and the value of the property when the company bought it, as this would be making a new contract between the parties:—*Held*, by Cotton and Fry, L.JJ. dissentiente Bowen, L.J., that this decision was right. *In re* CAPE BRETON COMPANY - - C. A. 795

PRIORITY—Judgment - - - 527
See JUDGMENT. 2.

—— Mortgages - - 149, 221, 725, 787
See MORTGAGE. 1, 2, 3, 4.

—— Mortgage—Creditors' deed - - 745
See CREDITORS' DEED.

—— Mortgage—Debentures of company - 715
See COMPANY. 4.

—— Mortgage—Middlesex registry - 702
See REGISTRY ACTS.

—— Mortgage—Renewable leasehold - 231
See RENEWABLE LEASE. 2.

PROBATE—Domicil - - - - 617
See DOMICIL. 1.

—— Domicil—Estoppel - - - 268
See ESTOPPEL. 1.

PRODUCTION OF DOCUMENTS - 307, 899
See PRACTICE. 15, 16.

PROFIT—Made by agent - - - 795
See PRINCIPAL AND AGENT.

PURCHASE-MONEY—Interest on - - 691
See VENDOR AND PURCHASER. 4.

—— Mortgaged estate—Second mortgagee 954
See MORTGAGE. 5.

PURCHASER WITHOUT NOTICE—Negligence—Priority - - - - - 725
See MORTGAGE. 3.

RAILWAY COMPANY—*Nuisance—Additional Lands—Cattle Station.*] A railway company were by their Act authorized, among other things, to carry cattle, and were also authorized to purchase by agreement (in addition to the lands which they were empowered to purchase compulsorily) any lands not exceeding in the whole fifty acres, in such places as should be deemed eligible, for the purpose of providing additional station yards, &c., for receiving, loading, or keeping any cattle or any goods, &c., conveyed or intended to be conveyed by the railway, and for making convenient ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite; and they were empowered to sell the additional lands, and to purchase in lieu thereof other lands which they should deem more eligible for their additional purposes, and afterwards to sell the same as aforesaid, and so from time to time. The company bought under this power a piece of land adjoining one of their

RAILWAY COMPANY—*continued.*

stations and used it as a cattle dock. The noise of the cattle and drovers was a nuisance to the occupiers of certain houses near the station, and they brought an action to restrain the company from continuing the nuisance:—*Held* (affirming the decision of North, J.), that the Plaintiffs were entitled to an injunction, for that there was nothing in the Act which by necessary implication authorized the creation of a nuisance on the additional lands. Truman *v.* London, Brighton, and South Coast Railway Company C. A. 89

2. —— *Power to underpin Buildings on adjoining Lands—Retaining Wall of Railway—Wall built with double Object—Appeal for Costs.*] A railway company had power to underpin or strengthen buildings on lands adjoining their line. They carried their line in a deep cutting close beside a building belonging to the Plaintiffs, and having given the required notice that they intended to underpin this building, they made a wall of concrete to support the Plaintiffs' building, part of the thickness of which was under the Plaintiffs' building, and part on the company's land, the whole wall forming the retaining wall of the railway cutting:—*Held* (reversing the decision of Chitty, J.), that the fact that the concrete wall was also the retaining wall of the railway did not make it the less an "underpinning" within the meaning of the Act; and therefore that the company had not acted beyond their powers in making the wall on the Plaintiffs' land. Stevens *v.* Metropolitan District Railway Company [C. A. 60

RECEIVER—Defaulting trustee - - 993
See Practice. 17.

RECITAL—Power of attorney - - 500
See Power of Attorney.

RECTIFICATION—Disentailing deed - 133
See Tenant in Tail.

—— Register of trade-mark - - 551
See Trade-makk. 2.

—— Voluntary settlement - - - 212
See Voluntary Settlement.

REDUCTION OF CAPITAL - - - 683
See Company. 7.

REGISTER—Baptism—Evidence of - 985
See Evidence.

REGISTRATION—Judgment - - 527
See Judgment. 2.

—— Trade-mark - - - 551, 877
See Trade-mark. 1, 2.

REGISTRY ACTS—*Mortgage—Real Estate in Middlesex—Share in Proceeds of Sale of—Priority—Registration in Middlesex—Middlesex Registry Act* (7 *Anne, c.* 20), *s.* 1—*Notice to Trustees—Equitable Execution.*] The local Registry Acts are intended to apply only to dealings at law or in equity with the land itself. Accordingly, an incumbrancer upon a share in the proceeds of real estate in Middlesex devised in trust for sale obtains no priority over other incumbrancers on such share by registering his mortgage deed, and the priorities of such incumbrancers rank according to the dates of their respective notices to the trustees.—*Malcolm* v. *Charlesworth* (1 Keen, 63) approved.—Although formal notice to the trustee of the proceeds of real estate devised in trust for sale or of a chose in action, of an incumbrance thereupon does not give priority over an earlier incumbrance of which the trustee may have obtained accidental notice, the converse proposition that incumbrances are to rank not in the order of notices given by the incumbrancers but of accidental knowledge obtained by the trustees, does not hold good.—A judgment creditor cannot, by giving notice to the trustee, put himself in a better position than the judgment debtor; and a judgment creditor who has obtained equitable execution by the appointment of a receiver subject to existing incumbrances was held to have obtained no priority by giving notice of the appointment to the trustee of the judgment debtor. Arden *v.* Arden - - - - - - 702

REMOTENESS—Testamentary power - 521
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REMUNERATION—Solicitor 199, 209, 608, 790
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RENEWABLE LEASE—*Customary Right of Renewal—Devise of Leaseholds for Life, with Remainder over—Renewals by Tenant for Life—Purchase by Tenant for Life of Reversion—Ownership of the Fee.*] The doctrine that a renewal of leaseholds by a tenant for life enures for the benefit of the remaindermen applies equally to a purchase of the reversion.—*Randall* v. *Russell* (3 Mer. 190) considered.—Testatrix devised leaseholds, renewable by custom, to J. P. for the residue of the term, and after the death of J. P., during the residue of the term, to the children of J. P. in equal shares. J. P. renewed the leaseholds more than once, and finally purchased the reversion:—*Held*, that the fee simple in the property passed by the devisee in the will to the children of J. P., and became subject to the trusts of the will. Phillips *v.* Phillips - - - - C. A. 673

2. —— *Mortgage—Purchase of Reversion by Mortgagor—Mortgage of Reversion—Rights of Mortgagees*—14 & 15 *Vict. c.* 104, *s.* 3—23 & 24 *Vict. c.* 124, *s.* 35.] An ecclesiastical lease of a house for a term of years, which was renewable by custom, though it contained no covenant by the lessors for renewal, was mortgaged, and the equity of redemption was afterwards assigned for value. The Ecclesiastical Commissioners, in whom the reversion had become vested, would not renew the lease, but before its expiration they agreed to sell the reversion to the assignee of the equity of redemption. The conveyance was not executed till after the expiration of the lease. While the negotiation for the purchase of the reversion was in progress the assignee borrowed £300, giving the lender a memorandum in writing, which stated that the money was to be secured by a mortgage from him of the house "so soon as he had completed the enfranchisement of the property from the Commissioners." The lender had no notice of the mortgage of the lease:—*Held*, that the mortgagor could only hold the fee simple of the property subject to the mortgage of the lease, and that he (and consequently the lender of the £300) was not entitled to any prior lien on the property for the purchase-money of the reversion, notwithstanding the fact that the mortgagor was under

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no obligation to the mortgagees of the lease to obtain a renewal of it, or to purchase the reversion. LEIGH *v.* BURNETT - - - 231

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SETTLED LAND ACT, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 25, 26, 53—*Payment of Prior Incumbrances—Land Drainage Charges—Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114), *ss.* 49, 51, 66.] Where a tenant for life of settled land has, prior to the Settled Land Act, 1882, created charges for land drainage and improvements under the Improvement of Land Act, 1864, and other Acts, which were repayable by instalments, he will not be entitled under the Settled Land Act, s. 21, sub-s. 2, to have these charges paid out of the capital of the settled estates so as to relieve him from the payment of the instalments.—Trustees who purchase such charges will hold them upon trust to receive the instalments payable by the tenant for life, and to treat them as capital.—The decision of Pearson, J., affirmed. *In re* KNATCHBULL'S SETTLED ESTATE - - C. A. 588

2. —— (45 & 46 *Vict. c.* 38), *s.* 58, *sub-ss.* 4, 6—*Tenant for Years—Tenant for Life—Estate determinable with Lease.*] A testator, who had granted a lease of a house for a term of thirty-one years from the 25th of March, 1859, at a rent of £50 a year, by his will, dated the 20th of June, 1866, devised his freehold interest in such house to trustees upon trust to permit his wife to receive the rent for her own benefit "during the remainder of the term granted by the said lease if she should so long live," and in case she should die "before the expiration of the term created by such lease" then he gave and devised the house to the children of his brother in fee, and he directed that if his wife should "happen to live after the expiration of the term created by such lease" then the trustees should sell the house, and out of the income from the investment of the proceeds pay £50 a year to his wife during her life, and subject thereto he gave the residue of the proceeds for his brother's children. The testator died in 1866, and the question being raised whether his widow

SETTLED LAND ACT, 1882—*continued.*

could, under the Settled Land Act, 1882, accept a surrender of such lease and grant a new lease of the house for a term of twenty-one years from the 25th of December, 1883, at an increased rent:—*Held* (affirming the decision of Pearson, J.), that the widow was not a person under sect. 58 of that Act entitled to the powers of a tenant for life and was therefore not able to accept a surrender and make a new lease of the house. *In re* Hazle's Settled Estates - - - **C. A. 78**

SETTLEMENT—*Covenant by Settlor for Payment of a Sum of Money during his Life or after his Death*—"*Free from all deductions*"—*Whether Succession Duty or Legacy Duty payable*—*Succession Duty Act* (16 & 17 *Vict. c.* 51), *ss.* 1, 42, 44—*Legacy Duty Act* (36 *Geo.* 3, *c.* 52), *s.* 6.] By a post-nuptial settlement the settlor, the wife's father, covenanted with the trustees for payment to them during his life, or within twelve calendar months after his death, of the sum of £10,000. "free from all deductions whatsoever," and an annuity of £200 in the meantime. On the death of the settlor his executor paid the full £10,000 to the trustees:—*Held*, that succession duty on the £10,000 was payable by the trustees and not by the executor. *In re* Higgins. Day *v.* Turnell [697

2. —— *Forfeiture*—*Insolvency*—*Bankruptcy Act*, 1869, *s.* 126—*Composition.*] Presentation by a firm of a petition for liquidation under the Bankruptcy Act, 1869, followed by acceptance by the creditors of a composition, operates as a forfeiture of an interest limited in 1862 to the use of A., who was a member of the firm, during his life, "or until he should be outlawed or declared bankrupt, or become an insolvent within the meaning of some Act of Parliament for the relief of insolvent debtors." Nixon *v.* Verry - 196

3. —— *Power of appointing new Trustees*—*Executor of sole Trustee*—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 31.] The power of appointing new trustees given by sect. 31 of the Conveyancing Act, 1881, to "the personal representatives of the last surviving or continuing trustee" includes the case of an executor of a sole trustee. *In re* Shafto's Trusts - - - - - **247**

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See Estoppel. 2.

SOLICITOR—*Bill of Costs*—*Taxation after Payment*—"*Special Circumstances*"—*Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 41.] Mortgagees for £2000 were proceeding to sell the mortgaged estates. On the 1st of September, S., the mortgagor's solicitor, wrote to B., the mortgagee's solicitor, informing him that he had found a transferee, and proposing to complete the transfer on the 3rd. B. wrote back proposing the 10th for completion, and afterwards postponed the appointment to the 13th. His bill of costs, which amounted with surveyor's charges to more than £450, was received by S. on the 9th. On that day S. wrote to B., saying that the bill of costs appeared excessive, and would require to be carefully gone into, but did not propose to postpone

SOLICITOR—*continued.*

the completion. On the 12th S. took with him a written protest against the bill, and had two interviews with B., at which arrangements were made for completion. S. did not mention the subject of costs at either interview, but deposed that he had intended to do so at a third appointment on the same day, which B. did not keep. On the 13th the parties met, the transfer was completed, and the bill of costs paid, B. refusing to part with the deeds unless it was paid. S. delivered his written protest, and it appeared that B. expressed willingness to reconsider his bill if any item were shewn to be erroneous, but said nothing to the effect that it was to be treated as open to taxation. The mortgagor applied for taxation, alleging pressure and overcharge, but not referring to any specific items of overcharge. Bacon, V.C., made an order for taxation, and B. appealed:—*Held*, by Cotton and Fry, L.JJ. (dissentiente Bowen, L.J.), that the order for taxation must be discharged, for that as the shortness of the interval between the delivery of the bill and the time fixed for completion did not arise from any act of the mortgagee's solicitor, but was owing only to the desire of the mortgagor for speedy completion, there was no pressure such as to justify taxation, though the case would have been otherwise if the mortgagee had been pressing for an early settlement:—*Held*, by Bowen, L.J., that the Solicitors Act, 1843, sect. 41, authorizes taxation after payment where there are special circumstances which, in the opinion of the Judge, require the same; that there is no inflexible rule that the special circumstances must be pressure with overcharge, or overcharge so gross as to amount to fraud; and that in the present case, as the parties did not at completion treat the bill as finally settled, and B. had taken advantage of the inconvenience which a postponement of the settlement would have occasioned to the mortgagor, there were special circumstances justifying taxation:—*Held*, by Bowen, L.J., that where a bill is so large as to be redolent of overcharge it is not necessary that specific items of overcharge should be pointed out:—*Held*, by Fry, L.J., that though the bill appeared excessive, the Court could not treat overcharge as shewn, unless specific items were pointed out on which it could exercise its judgment. *In re* Boycott - - **C. A. 571**

2. —— *Lien*—*Property* "*recovered or preserved*" *in Action*—*Solicitor discharged before Trial*—23 & 24 *Vict. c.* 127, *s.* 28.] A solicitor, through whose instrumentality property has been recovered or preserved in an action, is entitled under the 28th section of the Attorneys and Solicitors Act, 1860, to a declaration of charge upon such property, although his client may have discharged him before the trial of the action.—In such a case his charge will be subject to the lien for costs of the client's solicitor for the time being.—Money paid into Court as a security for the costs of a party to an action is not in case by the success of the party it becomes repayable to him, property "preserved" in the action within the meaning of the Act. *In re* Wadsworth. Rhodes *v.* Sugden - - - - - **517**

3. —— *Remuneration*—*Pending Business*—*Negotiations for Lease*—*Solicitors' Remuneration*

SOLICITOR—*continued.*

Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 7—*General Rules under Solicitors' Remuneration Act*, 1881, *rule* 2 (*a*), (*b*), (*c*); *Sched. I., Part II.*] Negotiations for a lease were carried on through the lessor's solicitor for two years before the rules under the Solicitors' Remuneration Act, 1881, came into operation. After they came into operation terms were come to, and a lease executed. The solicitor in his bill charged for the negotiations, and also charged the amount fixed by Sched. I., Part II., to the rules, as remuneration "for preparing, settling, and completing lease and counterpart." The Taxing Master disallowed all the items for negotiations, and Mr. Justice Chitty affirmed his decision. The solicitor appealed:—*Held*, by the Court of Appeal, that though the business had been commenced before the rules came into operation, the taxation must be conducted according to the rules, the solicitor not having declared his election to the contrary.—Whether he might on the rules coming into operation have effectually declared such election, *quære*.—*Held*, further, that having regard to rule 2, the amount fixed by Sched. I., Part II., included the charges for negotiations, and that the appeal must be dismissed. *In re* Field - - C. A. 608

4. —— *Remuneration — Taxation — Perusing Abstracts—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order (containing Scales of Charges) of August*, 1882, *Sched. II.*] Upon the construction of Sched. II. of the General Order (containing scales of charges) made in pursuance of the Solicitors' Remuneration Act, 1881, abstracts of title are not included in the words "deeds, wills, and other documents," the charge for perusing which is therein fixed at 1*s.* per folio; but the old scale of 6*s.* 8*d.* for perusal of every three brief sheets of eight folios each remains unaltered. *In re* R. A. Parker - - - - 199

5. —— *Remuneration — Sale by Auction — General Order under Solicitors' Remuneration Act*, 1881, *r.* 4; *Sched. I., Part I., r.* 11—*Commission to Auctioneer.*] Property of a lunatic in Lancashire was put up for sale by auction under an order in lunacy, but was not sold. The solicitor charged £16 12*s.* 6*d.* remuneration according to the scale in the order under the Solicitors' Remuneration Act, 1881, on £8300, the amount of the reserved prices. He also paid the auctioneer £5 5*s.*, which was allowed against the estate, and the surveyor's bill of £40 3*s.* was allowed at £31 10*s.* against the estate, but the Taxing Master disallowed the £16 12*s.* 6*d.*, and only allowed £2 2*s.* for instructing the auctioneer and surveyor, and £3 3*s.* for particulars, &c. His reasons were, first, that the solicitor had not in fact conducted the sale, the auctioneer and surveyor having done most of the work, and been paid by the client; and, secondly, that the scale did not apply, for that a commission had been paid to the auctioneer by the client within the meaning of rule 11 to Part I. of Schedule I. to the General Order.—*Held*, by the Court of Appeal, that as the bill of the surveyor contained charges for various things which it was the duty of the person conducting the sale to do, the solicitor had not done the whole of the work for which the ad valorem remuneration was provided, and the scale did not apply.—*Semble*, also, that the case was taken out of rule 4 by the specific provision of rule 11 to Part I. of Schedule I. to the Order, which provides that the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. *In re* Wilson - C. A. 790

SOLICITOR—*continued.*

6. —— *Remuneration — Sale under Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18)—*Reinvestment of Proceeds—Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order of August*, 1882, *Sch. I., pt.* 1, *rule* 11—*Scale Charges.*] Where land has been compulsorily taken by a railway company in exercise of its statutory powers, and the proceeds of sale have been paid into Court and subsequently reinvested in land, the costs incurred in such reinvestment may be charged for according to the scale fixed by the Solicitors' Remuneration Act, 1881.—The exception contained in rule 11 of the General Order, Sch. I., pt. I, does not apply to such costs. *In re* Merchant Taylors' Company - - - - - - 209

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TENANT IN TAIL—*Disentailing Deed—Enrolment—Settlement—Mistake—Rectification—Jurisdiction—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 40, 47.] Having regard to sects. 40

TENANT IN TAIL—*continued.*

and 47 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), the Court has no jurisdiction to rectify, on the ground of mistake, a deed which has been enrolled as a disentailing assurance under the Act, although the rectification asked is not in the disentailing part of the deed, but in a resettlement added to it which might have been effected by a separate unenrolled deed.—A testator, who died in 1836, devised his estates, subject to a prior limitation to A. for life, to the use of B. for life, with remainder to the use of "the first and other sons of B. in tail," with remainders over. In 1878, by a deed enrolled as a disentailing assurance under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), B., and C. his then only son, with the consent of A. as protector of the settlement, conveyed the estates, subject to A.'s life estate, but discharged from B.'s life estate and C.'s estate tail in remainder under the will, to the use of B. for life, with remainder to the use of C. in tail, with remainder to uses in favour of the Defendant and his issue.—It appeared to have been the intention of the parties to this resettlement to preserve therein the limitation in the will to "the first and other sons of B. in tail," but shortly after the death, in 1880, of C. a bachelor, B. being still living, it was discovered that this limitation had been omitted, and that consequently the limitations over in favour of the Defendant and his issue took effect to the exclusion of B.'s future issue, if any.—In an action by A. and B. against the Defendant, who was an infant, to have the deed of 1878 rectified by the insertion, next after C.'s estate tail, of a limitation to B.'s "second and other sons in tail:"—*Held*, that by sect. 47 of the above Act the Court was prohibited, in such a case, from exercising its ordinary jurisdiction as to the rectification of mistakes in deeds. HALL-DARE *v.* HALL-DARE - - - - 133

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TRADE-MARK—*Fancy Word — Registration—Patents, Designs and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *sub-s.* (1) (*c*).] The word "Alpine," and words of such class, although words in common use and not strictly fancy words, may, when applied to articles such as woollen and cotton goods, be registered as a trade-mark, as they are, if not "fancy words," at least fanciful words when applied to such goods, and so fall within sect. 64, sub-sect. (1) (c), of the the Patents, Designs and Trade-marks Act, 1883 (46 & 47 Vict. c. 57). *In re* TRADE-MARK "ALPINE" - - - - - 877

2. —— *Registration—Rectification of Register —Application after expiration of Five Years—Indefeasible Title—"Common to the Trade"—"Three Marks Rule"—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 74, 76, 90.] The registration of a mark as a

TRADE-MARK—*continued.*

trade-mark and the lapse of five years do not, under s. 76 of the Trade-marks Act, 1883, confer on the person who has made the registration an indefeasible title to the use of the mark as a trade-mark if, by reason of its being at the time of registration in common use in the trade, it ought not to have been registered. The lapse of five years cannot make good a registration which was in its inception invalid. A trade-mark which was originally improperly registered ought, even after the lapse of five years, to be removed from the register, because the registration might enable the person who has made it to commit a fraud:—*Held*, that a mark which had been registered as a trade-mark, was, at the time of registration, "common to the trade" because similar (though not in each case identical) marks were then in use by more than three persons engaged in the same trade, although in some of the cases the mark was not actually placed on the goods, but was only used on bill-heads, trade-circulars, advertisements, or show-cards. *In re* WRAGG'S TRADE-MARK - - - - - 551

TRIAL—By jury—Chancery Division - 50
See PRACTICE. 21.

—— Venue - - - - - 486
See PRACTICE. 22.

TRUST FOR SALE—Discretion—Interference of Court - - - - 913
See PRACTICE. 3.

TRUSTEE—*Costs—Costs of Trustee and Executor.*] One of two executors and trustees commenced an action against the other for the administration of the estate, and a decree was made. There was no allegation of any misconduct on the part of the Defendant. On the action coming on for further consideration, Mr. Justice Kay gave the Plaintiff his costs as between solicitor and client, but gave the Defendant costs only as between party and party, holding that two sets of costs as between solicitor and client ought not to be allowed to the trustees:—*Held*, on appeal, that the trustee is entitled to costs as between solicitor and client in an administration action, unless a case of misconduct is made out against him, and that the Defendant must have costs as between solicitor and client. *In re* LOVE. HILL *v.* SPURGEON - - - - C. A. 348

2. —— *Power of Investment—Uncontrolled Discretion.*] A testator directed that his trustees should invest the moneys coming to their hands in respect of his estate in their names or under their control in such mode or modes of investment as they in their uncontrolled discretion should think fit. Before the commencement of an action to administer the testator's estate, the trustees (who were also executors) invested moneys forming part of it in the purchase of bonds of a foreign Government, bonds of a colonial railway company, and shares of a bank on which there was a further liability. The Chief Clerk, in taking the accounts of the testator's estate, disallowed the trustees the sums which they had expended in the purchase of these bonds and shares. The shares in the bank had been previously sold at a profit:—*Held*, that, though the investments in question ought not to be retained

TRUSTEE—*continued.*
by the trustees, yet, as they had acted bonâ fide, and no loss had resulted to the trust estate, they ought not to be disallowed the sums which they had laid out in making the investments. *In re* Brown. Brown *v.* Brown - - - 889
—— Bare trustee—Vendor and Purchaser Act *See* Vendor and Purchaser. 2. [693
—— Costs—Appeal—New and old Rules of Court - - - - 495
See Practice. 5.
—— Maintenance of infant—Discretion - 921
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—— Negligence—Inquiry for title deeds - 221
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—— New—Appointment - - - 247
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TRUSTEE IN LIQUIDATION—Exercise of power of appointment - - - 1005
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TURNPIKE ROAD - - - - 750
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UNDERPINNING BUILDINGS - - 60
See Railway Company. 2.

UNQUALIFIED MEDICAL PRACTITIONER 596
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UNREGISTERED COMPANY - - 1
See Company. 9.

USER—Patent—Purpose of experiment - 164
See Patent. 2.

UTILITY—Patent - - - - 366
See Patent. 3.

VENUE—Trial - - - - 486
See Practice.

VENDOR AND PURCHASER—*Conditions of Sale—Right to rescind.*] Land was contracted to be sold under a condition that "if the purchaser should take any objection or make any requisition" which the vendor was "unable or unwilling to remove or comply with," the vendor might rescind the contract.—The purchasers made requisitions, and the vendor, for reasons stated, declined to comply with several of them. The purchasers insisted, and the vendor served them with notice that "being unable or unwilling to remove or comply with" the requisitions, he rescinded the contract. The purchasers in reply denied the vendor's right to rescind, withdrew their requisitions, and stated that they were willing to complete:—*Held* (affirming the judgment of Bacon, V.C.), that the contract had been duly rescinded. *In re* Dames and Wood - - C. A. 626

2. —— *Conveyance—Married Woman—Trust for Sale—"Bare Trustee"—Administration Action—Order for Sale—Acknowledgment—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 77, 79—*Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 6.] A testator devised his real estate to trustees for sale, who were married women, one of them having married before and the other after the

VENDOR AND PURCHASER—*continued.*
Married Women's Property Act, 1882. Both of them also took beneficial interests in the proceeds of sale. Under the judgment in an action for the administration of the testator's estate, part of the real estate was sold by the trustees, the purchaser paying his purchase-money into Court:—*Held*, that the married women were "bare trustees" within sect. 6 of the Vendor and Purchaser Act, 1874, and that the conveyance to the purchaser did not require the concurrence of the husbands, or acknowledgment under the Fines and Recoveries Act. *In re* Docwra. Docwra *v.* Faith - - - - - - 693

3. —— *Interest—Mistake—Repayment—Summons—Jurisdiction—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.] A purchaser who has, under his contract, erroneously paid the vendor interest on the purchase-money cannot recover it by summons under sect. 9 of the Vendor and Purchaser Act, 1874, but must proceed by action in the ordinary way. *In re* Young & Harston's Contract - - - 691

4. —— *Notice of Defects of Title—Repudiation by Purchaser—License to assign.*] A railway company agreed to demise to E. for building purposes certain lands which they had acquired under their compulsory powers. E. was restrained from assigning without license. The property had formerly belonged to a building society, which had sold it in lots, each purchaser entering into restrictive covenants for the benefit of the owners of the other lots, and the conveyance to the company was expressly made subject to these covenants. E. agreed to sell his interest under the contract to R. R. at the time of the contract knew of the restrictive covenants, but believed that the compulsory purchase by the railway company had extinguished them. E. did not know of their existence. R.'s solicitors having discovered the existence of the covenants objected to the title. E.'s solicitors replied that the compulsory purchase had extinguished them. R. then refused to proceed with the purchase. E. brought a bill for specific performance, but having afterwards resumed possession, and built, in order to avoid a forfeiture, the action came on as an action for damages. E. had never obtained a license to assign:—*Held*, by Kay, J., that as E. had not either at the time of the repudiation of the contract by the Defendant, or subsequently, obtained a license to assign, he never was in a position to perform his part of the contract, and therefore could not recover damages. *Semble*, also, that R. had not such knowledge that the property was still subject to the covenants as to debar him from requiring a title free from them.—*Held*, on appeal, that R. was entitled to object to the title on the ground of the restrictive covenants, for that in order to take a case out of the general rule that a purchaser is entitled to require a good title, it must be shewn that at the time of the contract he knew that a good title could not be made, and that here such knowledge was not shewn, as R. believed that the covenants had been extinguished. — *Semble*, that R.'s objection on the ground that a license to assign had not been obtained was not valid, inasmuch as he had repudiated the contract before the time had arrived at

VENDOR AND PURCHASER—*continued.*
which it was necessary for the vendor to produce a license. Ellis *v.* Rogers - - C. A. 661

VOLUNTARY SETTLEMENT — *Rectification — Power of Revocation.*] By a voluntary settlement property was assigned to trustees in trust for the settlor for life, remainder for any wife he might marry for life, with remainders to his issue, and in default or failure of issue in trust for his paternal next of kin:—*Held*, that though a settlement was proper to be made, and though the settlor understood the terms of this settlement, yet as his attention was not drawn to the fact that he might have had a power of disposition over the property in default or failure of issue, such a power ought to be given, and the settlement must be rectified accordingly. James *v.* Couchman - - - - - 212

WATER—*Underground Water—Pollution of Well —Nuisance—Injunction.*] No one has a right to use his own land in such a way as to be a nuisance to his neighbour, and therefore if a man puts filth or poisonous matter on his land, he must take care that it does not escape so as to poison water which his neighbour has a right to use, although his neighbour may have no property in such water at the time it is fouled.—The Plaintiff and Defendant were adjoining landowners, and had each a deep well on his own land, the Plaintiff's land being at a lower level than the Defendant's. The Defendant turned sewage from his house into his well, and thus polluted the water that percolated underground from the Defendant's to the Plaintiff's land, and consequently the water which came into the Plaintiff's well from such percolating water when he used his well by pumping, came adulterated with the sewage from the Defendant's well:—*Held* (reversing the decision of of Mr. Justice Pearson), that the Plaintiff had a right of action against the Defendant for so polluting the source of supply, although until the Plaintiff had appropriated it, he had no property in the percolating water under his land, and although he appropriated such water by the artificial means of pumping. Ballard *v.* Tomlinson [C. A. 115

WELL—Pollution of - - - - 115
See Water.

WILL—*Absolute Interest — Life Interest — Remainder.*] A testatrix by her will appointed two-fifths of certain property to trustees upon trust to pay the income to her son until he should attain the age of forty years, and then to hold the same in trust for her son his executors and administrators; provided that in case her son should assign his share in the property, then the aforesaid bequests should be void, and the two-fifths should be held upon the trusts declared as to the other three-fifths. The son died before he attained the age of forty without having assigned:—*Held*, that the two-fifths vested in trust for the son absolutely so as to pass by his will. Scotney *v.* Lomer - 535

2. —— *Charge of — Debts and Legacies — Exoneration—Mortmain Act — Lapsed Bequest.*] Where a testator, having bequeathed his personal estate, exonerates it from debts and legacies, which he charges on real estate, and part of the bequest lapses or fails under the Mortmain Act, the exemption does not extend to the lapsed portion.—A testatrix devised her real estate to trustees in trust for sale, and directed them, out of the proceeds, to pay her funeral and testamentary expenses, debts, legacies, and duties; and she directed her trustees to sell her leaseholds, and to apply the proceeds in payment of so much of her debts, &c., as the proceeds of her real estate should be insufficient to pay; and she bequeathed all her personal estate to a charity. Part of the personal estate consisted of a mortgage debt, as to which the bequest failed and lapsed to the Crown, there being no next of kin:—*Held*, that the debts, expenses, legacies, and duties were chargeable, first, on the impure personalty; secondly, on the real estate; and thirdly, on the leaseholds. Kilford *v.* Blaney [145

3. —— *Executor—Legacy to Person appointed Executor—Gift annexed to Office—Rebuttal of Presumption—Parol Evidence.*] The mere fact that the gift of the legacy precedes the appointment of the legatee as executor—or that the legacies to several persons appointed executors differ either in their amount or subject-matter—is not enough by itself to rebut the presumption, that a legacy given to a person who is appointed executor is annexed to the office.—*Jewis* v. *Lawrence* (Law Rep. 8 Eq. 345) questioned.—*Wildes* v. *Davies* (1 Sm. & Giff. 475; 22 L. J. (Ch.) 497) explained.—Per Cotton, L.J. (dubitante, Fry, L.J.):—Parol evidence is admissible to rebut this, as well as any other, presumption. *In re* Appleton. Barber *v.* Tebbit - - - - - - 893

4. —— *Residue—Direction that Share "shall fall into residue."*] A testator bequeathed the residue of his personal estate to his wife for life, and after her death to his sister and three brothers in equal shares; but directed that in the event of his sister dying unmarried in his wife's lifetime (which happened) "her one-fourth should fall into the residue":—*Held*, that there was no intestacy as to the sister's one-fourth, but that the whole residue was, on the widow's death, divisible in thirds between the three other legatees.—*Humble* v. *Shore* (7 Hare, 247; 1 H. & M. 550, n.), *Lightfoot* v. *Burstall* (1 H. & M. 546), and *Crawshaw* v. *Crawshaw* (14 Ch. D. 817) considered. *In re* Rhoades. Lane *v.* Rhoades - 142

5. —— *Construction—"Surviving."*] A testator devised to each of his children an estate for the life of that child, with remainder to the children of that child, and in case any or either of the testator's children should die without leaving any child or children him, her, or them surviving, then the testator devised the estates to which their child or children respectively would have been entitled under his will, if living, to his, the testator's, surviving children for their respective natural lives, and after their deceases respectively he gave their respective shares to their respective children, their heirs, executors, administrators, and assigns. There was no gift over on the death of all the testator's children without leaving children. C., one of the testator's children, died

WILL—*continued.*

without leaving issue. Some of the other children were then living; others had died leaving children of theirs then living:—*Held*, that the word "surviving" was to be read in its proper sense, and that the children of those children of the testator who had predeceased C., took no interest in the estate of which C. was tenant for life.—The fact that the original shares are all settled by the will, and that the shares which the "survivors" take in the share of a child who dies without issue, are settled in the same way as their original shares, is not by itself sufficient to shew that "survivors" is used otherwise than in its proper sense. *In re* Benn. Benn *v.* Benn **C. A. 839**

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